Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

WILLIAM WADDELL STAPLETON, *et al.*, Petitioner, Individually and as Representative for the Class of Claimants in pending Cause No. 15,445 in the Circuit Court of Rankin County, Mississippi and all others similarly situated,

v.

SEAMUS IAIN COWLEY, *et al.*, Individually, and as Representative of other Underwriters subscribing to policy number 5239328506, Respondents,

and

TEXAS SNUBBING CONTROL, INC., a Texas Corporation, Respondent,

and

GARY KNOSTMAN, Trustee of the Estate in Bankruptcy of Tomlinson Interests, Inc., a Texas corporation, Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) May an injured third party litigate coverage issues against the insurer in the federal forum under Fed.R.Civ.P. 57 and the Declaratory Judgment Act, even though he has not yet obtained a state court judgment against the insured, since Rule 57 and the Declaratory Judgment Act provide federal procedure which ousts conflicting state procedural rules?

2) Is the injured third party, in the context of a Declaratory Judgment action, a Fed.R.Civ.P. 19 party who therefore necessarily has standing to defend his claims?

3) Did the lower courts overstep their Article III powers by ignoring state substantive law which prohibits binding a third party to a settlement agreement to which he is not party, and thereby raise grave equal protection concerns?

4) Did the lower courts act beyond the scope of the Declaratory Judgment Act by basing their decision that no coverage existed for the third party on the terms of the settlement agreement between the insured and the insurer rather than construing the rights of the parties according to the terms of the policy?

The names of all parties to this action appear on the cover page.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTE 3

STATEMENT OF THE CASE 3

(a) Course of Proceedings and Disposition Below 3

(b) Facts 4

REASONS FOR ALLOWING THE WRIT 7

I. This Court needs to establish that the Declaratory Judgment Act provides federal procedure which ousts state procedural rules, thereby permitting an injured third party in "no direct action" states to litigate insurance coverage issues in the federal forum before the injured third party obtains judgment against the insured 7

A. The Court should acknowledge that an injured third party joined as a defendant under the Declaratory Judgment Act is a Rule 19 party and necessarily has standing to pursue coverage claims in the federal forum 7

TABLE OF CONTENTS – Continued

Page

B. Because the lower courts applied state procedural rules rather than federal procedure to dismiss Stapleton's claims, this Court should correct the lower courts' departure from the usual course of federal proceedings and should correct the error to prevent a conflict among the circuits 9

II. The lower courts exceeded their Article III powers by applying law in conflict with state substantive law; this fact raises the question of equal protection under the law within our federal system 13

A. The District Court bound Stapleton to the terms of a settlement to which he was not a party, an act unequivocally prohibited by both Texas and Mississippi 13

B. Failing to hear this case will create the potential for state and federal conflicts because no other court besides the district court in this case has permitted an abusive use of the Declaratory Judgment Act purporting to cut off injured persons inchoate rights to insurance proceeds 15

III. The District Court's opinion and the Court of Appeals' affirmance open the door for an abusive use of the Declaratory Judgment Act in the vast majority of states which do not permit direct actions against an insurer 18

TABLE OF AUTHORITIES

Page

CASES:

Alack v. Phelps, 230 So.2d 789 (Miss. 1970)..... 13

Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958)..... 13

Cowley v. Texas Snubbing Control, Inc., 812 F.Supp. 1437 (S.D.Miss. 1992).....7, 15, 16

Dancy v. Cave, 760 S.W.2d 40 (Tex.Ct.App. – Amarillo 1988)..... 13

Diamond v. Charles, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986)..... 8

Empire Fire and Marine Ins. Co. v. Goodman, 412 P.2d 569 (Mont. 1966).....19, 20

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).....13, 14

Federal Kemper Ins. Co. v. Rauscher, 807 F.2d 345 (3rd Cir. 1986)..... 12

Finkelberg v. Continental Cas. Co., 126 Wash. 543, 219 P. 12 (1923) (*en banc*)..... 16

Firefighters v. Cleveland, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986)..... 13

Goldstein v. Bernstein, 315 Mass. 329, 52 N.E.2d 559 (1943)..... 16

Grand Trunk Western R. Co. v. Consolidated Rail Corp., 746 F.2d 323 (6th Cir. 1984)..... 19

Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).....11, 14

Hawkeye-Security Ins. Co. v. Schulte, 302 F.2d 174 (7th Cir. 1962)..... 12

TABLE OF AUTHORITIES – Continued

Page

Keanum v. Southern Ry. Co., 151 Miss. 784, 119 So. 301 (1928) 13

Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 826, 61 S.Ct. 510, 85 L.Ed. 826 (1941) 8, 9

Maryland Cas. Co. v. Wilson, 6 Ariz.App. 470, 433 P.2d 650 (1967) 16

National Surety Corp. v. Sanders, 53 Ala.App. 405, 301 So.2d 93 (1974) 16

Nelms v. State Farm Mut. Auto. Ins. Co., 463 F.2d 1190 (5th Cir. 1972) 10

Omaha Property & Cas. Ins. Co. v. Johnson, 923 F.2d 446 (6th Cir. 1991) 19

Pearson v. Globe Indemnity Co., 311 F.2d 517 (5th Cir. 1962) 10

Ranger Ins. Co. v. United Housing of New Mexico, Inc., 488 F.2d 682 (5th Cir. 1974) 8

Reagor v. Travelers Ins. Co., 92 Ill.App.3d 99, 47 Ill.Dec. 507, 415 N.E.2d 512 (1980) 16

Truck Ins. Exchange v. Ashland Oil, Inc., 951 F.2d 787 (7th Cir. 1992) 11, 12

Womack v. Allstate Ins. Co., 156 Tex. 467, 296 S.W.2d 233 (1957) 16, 17

CONSTITUTION, STATUTES, RULES:

Article III 14, 15, 17

Declaratory Judgment Act, 28 U.S.C. Section 2201 *et seq.* 3, 12, 19

TABLE OF AUTHORITIES – Continued

Page

Fed.R.Civ.P. 19 ..... 7, 9, 16

Fed.R.Civ.P. 57 ..... 12, 19

Sup. Ct. R. 10 ..... 12, 15

TREATISE:

8 Appleman, *Insurance Law and Practice* Section 4812 (1981) 16

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, William Waddell Stapleton, representing a defendant class, respectfully prays that this Honorable Court issue a writ of certiorari to review the judgments and opinions of the United States Court of

Appeals for the Fifth Circuit and the United States District Court for the Southern District of Mississippi.

OPINIONS BELOW

The opinion of the Court of Appeals is an unpublished *per curiam* opinion issued 17 January 1994, and is reproduced in its entirety in the Appendix to this Petition. Petitioner's request for rehearing and hearing *en banc* was denied and that order is also reproduced in the Appendix.

The opinion of the United States District Court for the Southern District of Mississippi (Lee, J.) is reported at 812 F.Supp. 1437, and is also reprinted in the Appendix.

JURISDICTION

Respondent Cowley invoked federal diversity jurisdiction pursuant to 28 U.S.C. § 1332 to have this declaratory judgment action heard. The district court dismissed Stapleton's claims and granted summary judgment for Cowley on 8 December 1993.

Stapleton timely appealed and the Fifth Circuit entered an unpublished *per curiam* affirmance on 17 January 1994. Petitioner timely requested rehearing and hearing *en banc* which request was denied on 14 March 1994.

STATUTE

28 U.S.C. § 2201. Declaratory Judgments – Creation of Remedy (a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

(a) Course of Proceedings and Disposition Below

On 20 January 1989, Plaintiff, C.O. Gibb, Representing Underwriters at Lloyd's, London ("Underwriters"), filed a declaratory judgment action against Defendants, Texas Snubbing Control, Inc. ("Texas Snubbing"), Gary Knostman, Trustee of the Estate of Bankruptcy of Tomlinson Interests, Inc. ("Knostman"), and William Waddell Stapleton as class representative for a class of claimants in a pending cause in Circuit Court of Rankin County, Mississippi ("Stapleton") (R. 1-9). Gibbs was later replaced by Seamus Iain Cowley as representative of the Lloyd's Underwriters.

This petition arises from the lower court's dismissal under a 12(b)(6) motion of various claims that Stapleton

raised in the context of coverage in the declaratory judgment action and from a summary judgment favoring Lloyd's Underwriters and Texas Snubbing. The United States Court of Appeals for the Fifth Circuit affirmed per curiam without opinion on 17 January 1994; a request for panel rehearing and hearing *en banc* was denied on 14 March 1994.

(b) Facts

Stapleton's state court lawsuit was one of many filed by residents living in proximity to a gas well that exploded in Rankin County, Mississippi causing bodily injury and property damage from toxic gases (R. 324, 418, 1594). Knostman was the well operator and had hired Texas Snubbing as the snubbing contractor (R. 594).

Texas Snubbing had $2.5 million of liability insurance with Lloyd's Underwriters through RISC, Inc., a Texas insurance broker (R. 257, 407, 994, 1598). Coverage consisted of a primary policy with coverage limits of $500,000 and a $2,000,000 umbrella policy (R. 323, 407, 1594-95). Based on representations of RISC, Texas Snubbing believed that coverage had been bound at the time of its application in 1984 (R. 407, 1598). In May of 1985, but before the explosion or blowout, RISC discovered that Devitt Energy, the London broker with whom RISC had negotiated, had purportedly not bound the coverage (R. 407, 1598). Other coverage was obtained and made retroactive to October, 1984 (R. 407, 1598).

In response to lawsuits generated by the explosion and pursuant to the policy or policies in question, Underwriters paid about $750,000 to plaintiffs seeking compensation for claims similar to Stapleton's (R. 324, 1080-82, 1595). Thereafter, Underwriters filed this declaratory judgment action (R. 1-9).

Discovery revealed that Underwriters may have engaged in the substitution or alteration of Texas Snubbing's policy (R. 279-80). A policy form found in RISC's files had different exclusions than the policy attached to the complaint which might make the well explosion an uncovered event (R. 279-80, 312-334, 327). Numerous discovery contests ensued.

Before discovery was completed, on August 6, 1991, Texas Snubbing and Knostman entered into a settlement agreement with Underwriters (R. 411). Underwriters agreed to pay Texas Snubbing $15,000 in settlement of Texas Snubbing's bad faith claim and $15,000 to Jim Hutchings for indemnification of liability he may personally incur (R. 413). For the release of Knostman's claims against Texas Snubbing, Underwriters agreed to pay Knostman $360,000 (R. 412-13).

In return, Texas Snubbing and Jim Hutchings, President of Texas Snubbing, ratified any and all acts of Devitt Energy, the London broker, in negotiating, drafting, and assembling the policy that was placed through RISC (R. 413). Texas Snubbing and Jim Hutchings also agreed to release Underwriters from all claims arising out of the blowout which included the claims of members of the class certified by the district court (R. 414-415).

Stapleton was unaware of these backroom negotiations. The agreement was consummated while his attorneys were in the United Kingdom conducting depositions in this case (R. 368, 790-794, 1600). Stapleton amended his answer and counter-claim against Underwriters, filed a cross-claim against Texas Snubbing, and filed a third party claim against Jim Hutchings, claiming fraudulent settlement and other independent torts (R. 564-639).

On 12 December 1991 the district court ordered the dismissal of Knostman and Texas Snubbing per the terms of the settlement agreement (R. 784). Having not been heard on his cross-claim and third party claims, Stapleton filed a motion to set aside this order (R. 790-899). Underwriters followed with a motion to dismiss Stapleton's counter-claim and for summary judgment (R. 900). Texas Snubbing and Jim Hutchings joined Underwriters' motion to dismiss (R. 784). The Court halted discovery pending determination of the motions (R. 1305).

On 8 December 1992 the district court issued a 47 page Memorandum Opinion and Order. The Court dismissed Stapleton's claims pursuant to Rule 12(b)(6) on the grounds that without a judgment against Texas Snubbing Stapleton did not have standing to litigate coverage issues (R. 1593-1639). The Court granted Underwriters' motion for summary judgment and held that the settlement agreement was binding on Stapleton and specifically ruled that the settlement agreement also extinguished any potential rights that Stapleton might have (R. 1619-39).

Because the action terminated in this manner, no hearing on the merits regarding which contract was in

force at the time of the well explosion was ever held. Nor was any hearing on the proper construction of the contract's terms ever held.

REASONS FOR ALLOWING THE WRIT

I. This Court needs to establish that the Declaratory Judgment Act provides federal procedure which ousts state procedural rules, thereby permitting an injured third party in "no direct action" states to litigate insurance coverage issues in the federal forum before the injured third party obtains judgment against the insured.

Stapleton's claims relating to coverage were dismissed. The district court reasoned, and the Court of Appeals concurred, "it is clear that Stapleton has no standing to pursue a claim for insurance coverage," *Cowley v. Texas Snubbing Control, Inc.*, 812 F.Supp. 1437, 1444-45 (S.D.Miss. 1992). This is so, the district court said, because Mississippi and Texas are both "no direct action" states. If that statement seems like a *non sequitur*, the Court should be aware that Stapleton can offer neither explanation nor solace. Thus, correcting the district court will require the Court to revisit procedural ground upon which it has not trod since the October Term of 1940.

A. The Court should acknowledge that an injured third party joined as a defendant under the Declaratory Judgment Act is a Rule 19 party and necessarily has standing to pursue coverage claims in the federal forum.

That injured third parties, who have not yet obtained a judgment, are proper parties to a declaratory judgment

action in federal court is clear. *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 826, 61 S.Ct. 510, 85 L.Ed. 826 (1941); *Ranger Ins. Co. v. United Housing of New Mexico, Inc.*, 488 F.2d 682 (5th Cir. 1974) (injured persons are Rule 19 parties to declaratory judgment action filed by insurer).

This axiomatic proposition should answer the procedural question raised by this petition and also should have obviated the result below. However, it was insufficient to command the attention of the district court or the Court of Appeals. Nonetheless, that Stapleton had Article III standing to contest coverage has been clear under the Declaratory Judgment Act since 1941.

The *Maryland Casualty* Court determined that because injured persons with a judgment against the insured could then use a state's "reach and apply" law to sue the insurer, the injured person could be joined as a defendant in a declaratory judgment action. This was so, the Court concluded, whether the injured person had obtained a judgment at the time of the declaratory judgment action or not. *Maryland Casualty*, 312 U.S. at 273, 61 S.Ct. at 512.

Given the usual length of proceedings in lower courts, *Maryland Casualty* was probably a pre-rules case. The conclusion that the joinder of the injured person, Orteca, was proper leads to the inescapable conclusion that injured persons are now Rule 19 parties. This Court historically has been shy about whether party joinder rules imply Article III standing. See, e.g., *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986).

However, in the face of Fed. R. Civ. P. 19's undergirding policy – joining persons whose interest in the underlying transaction might be practically affected by a judgment – and *Maryland Casualty*, in the context of this case, Stapleton could only be a Rule 19 party.

Because of the number of insurers who will use the Declaratory Judgment Act to terminate coverage to injured persons, this case will have far reaching effects beyond its specific facts. To resolve an important federal issue, Stapleton respectfully asks this Court to finally declare that one who is a Rule 19 party necessarily has Article III standing to litigate coverage issues.

B. Because the lower courts applied state procedural rules rather than federal procedure to dismiss Stapleton's claims, this Court should correct the lower courts' departure from the usual course of federal proceedings and should correct the error to prevent a conflict among the circuits.

At least two of Stapleton's claims which the district court dismissed relate to whether the Lloyd's Underwriters' policy provided coverage. First, in Count I of his amended answer and counter-claim, Stapleton requested the district court declare that the injuries suffered by Stapleton's class were covered. When discovery revealed a possible substitution of policies, Stapleton filed a counter-claim, Count II, to litigate the issue of which policy's language controlled. That Stapleton also asked for coercive relief in a voluminous pleading – relief to which he may or may not be entitled according to substantive state law – should not obscure the fact that he sought to litigate coverage.

The district court assumed that Stapleton had "no present interest" in the policy because he had not yet obtained a judgment against the insured. Therefore Stapleton could not litigate coverage issues because Mississippi and Texas require the familiar two step process of "no direct actions" states. The district court appears to have assumed, therefore, that Stapleton could not litigate coverage issues in the declaratory judgment action that he could in state court in the second suit against the indemnitor.

How the district court could reach this conclusion is a mystery. As incredible as it seems, the only possible explanation seems to be that the district court confused litigating coverage issues in a declaratory judgment suit with litigating the issue of liability and recovery under the policy.

In litigating coverage and contract construction questions, only the timing is different as between state proceedings and a federal declaratory judgment action. Hence, both Mississippi and Texas view "no direct action" rules as state *procedure. Nelms v. State Farm Mut. Auto. Ins. Co.*, 463 F.2d 1190 (5th Cir. 1972) (Texas courts view rule against direct actions as procedural); *Pearson v. Globe Indemnity Co.*, 311 F.2d 517 (5th Cir. 1962) (Mississippi courts view Louisiana direct action statute as procedural).

The correct federal procedure under the Declaratory Judgment Act, where insurers join insureds and injured persons, was succinctly explained by Judge Posner:

> Ordinarily a victim cannot complain about the coverage of his injurer's liability insurance policy. We shall see that he may have a practical interest and some limited legal rights in the insurance contract, but he is not a third-party beneficiary of it.
>
> . . .
>
> In these circumstances, (the injured party's) interest is not so remote, improbable, or impalpable that it lacks standing to litigate the coverage of the policy . . . Although an insured's tort victim cannot (except in direct-action states) sue the insurance company directly, he has a legal right to protect his potential interest in the policy. . . . That right is conferred in recognition that a tort victim has a practical, albeit only a potential, financial interest in the tortfeasor's insurance policy, and the impairment of such an interest is an injury that will support standing under Article III.

Truck Ins. Exchange v. Ashland Oil, Inc., 951 F.2d 787, 789 (7th Cir. 1992).

Federal declaratory judgment procedure, where the injured person is joined, requires the injured person to contest coverage or default. The mandate of *Hanna v. Plumer* is clear: in federal court, federal procedure ousts conflicting state procedure.

Applying state procedural law in the federal forum, in this case, was gross error. Except in extraordinary circumstances, this Court's decision in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), has laid to rest forever the issue of whether federal courts apply state procedure or federal procedure.

Since about 46 or 47 states are "no direct actions" states, the holding of the lower federal courts, if permitted to stand, threatens the goal of uniformity of federal procedure under Fed.R.Civ.P. 57 and the Declaratory Judgment Act, 28 U.S.C. Section 2201 *et seq.* For this reason, a grant of certiorari is necessary in the exercise of this Court's supervisory power. Sup. Ct. R. 10(a).

Finally, the Court of Appeals' affirmance places the Fifth Circuit in conflict with Courts of Appeals which have addressed the issue of whether injured third persons, not yet having obtained judgment against the insured, may contest coverage issues in federal court. *Truck Ins. Exchange v. Ashland Oil, Inc.*, 951 F.2d 787 (7th Cir. 1992); *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345 (3rd Cir. 1986); *Hawkeye-Security Ins. Co. v. Schulte*, 302 F.2d 174 (7th Cir. 1962). For this reason, granting this petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit is necessary under the standards contained in this Court's Rule 10(a) and 10(c), to resolve an important and direct conflict between the Courts of Appeals.

II. The lower courts exceeded their Article III powers by applying law in conflict with state substantive law; this fact raises the question of equal protection under the law within our federal system.

A. The district court bound Stapleton to the terms of a settlement to which he was not a party, an act unequivocally prohibited by both Texas and Mississippi.

Fundamental to the substantive law of Mississippi and Texas is the principle that one not a party to a settlement cannot be bound by that settlement. *Alack v. Phelps*, 230 So.2d 789 (Miss. 1970); *Keanum v. Southern Ry. Co.*, 151 Miss. 784, 119 So. 301 (1928); *Dancy v. Cave*, 760 S.W.2d 40 (Tex.Ct.App. – Amarillo 1988). However, in its grant of summary judgment to Lloyd's Underwriters the district court held that Stapleton was bound to the terms of the settlement agreement between others.

Whatever controversies may linger around *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), the *Erie* Doctrine requires federal courts sitting in diversity to apply state substantive law. And since, in this case, there is no potential conflict between the federal practice and state substantive law, the considerations of *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), are not implicated. *See, e.g., Firefighters v. Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986).

The district court's result, then, is not merely "wrongly decided" the district court failed to apply a fundamental legal tenet. As Chief Justice Earl Warren, speaking for a unanimous Court, reminded us,

> neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution, in such areas state law must govern because **there can be no other law.**

Plumer, 380 U.S. 460, 471-72, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965) (emphasis supplied). Whether one regards the Constitutional underpinnings of *Erie* as a Tenth Amendment matter, an equal protection concern, or an issue of separation of powers is not very relevant because, as a fundamental view of federalism, it may be characterized fairly as all of these.

The upshot for this case is that *Erie* creates a jurisdictional or quasi-jurisdictional framework for federal courts. There is nothing in our jurisprudence clearer than that federal courts, sitting in diversity, have no power to make rules of decision in conflict with state law. This necessarily implies a limitation on the power of courts created under Article III. Hence, when a federal court creates a rule of decision contrary to fundamental state substantive law, it acts without its jurisdiction granted by Article III.

The district court has created a rule of decision in conflict with the substantive law of Mississippi and Texas. If the Erie Doctrine is to be something more than an immemorial cliche of "our federalism," then it necessarily implies a limitation on the power of federal courts under Article III. The district court, having exceeded its authority, is without jurisdiction and has rendered a judgment void as a matter of law.

Stapleton further believes that a federal court acting *ultra vires* Article III violates the rights guaranteed to him under the Fifth Amendment. However, other than this petition, Stapleton has not yet sought other relief. For the purposes of this Petition, the Court and the parties need not explore that contention. It is enough that a federal court, acting outside its Article III powers, implicates in a dramatic way this Court's ultimate responsibility to supervise lower federal courts. Sup. Ct. R. 10(a).

B. Failing to hear this case will create the potential for state and federal conflicts because no other court besides the district court in this case has permitted an abusive use of the Declaratory Judgment Act purporting to cut off injured persons inchoate rights to insurance proceeds.

The district court cited a mountain of authority for the general rule that "the rights of the injured party in a liability insurance policy applicable to an accident arise 'immediately upon the happening of the accident,' and 'cannot be destroyed by an attempted subsequent cancellation, release, or compromise by the insured and insurer.' (citation omitted)." *Cowley*, 812 F.Supp. at 1452. Research has revealed no court, other than the district court in this case, which has permitted an insurer and insured to terminate injured third parties' inchoate rights to insurance proceeds.

All other courts faced with the issue of whether a settlement effected between the insurer and insured may

cut off the injured party's contingent rights have rendered such agreements void as a matter of public policy. *E.g., Womack v. Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233 (1957); *Goldstein v. Bernstein*, 315 Mass. 329, 52 N.E.2d 559 (1943); *Finkelberg v. Continental Cas. Co.*, 126 Wash. 543, 219 P. 12 (1923) (*en banc*); *Reagor v. Travelers Ins. Co.*, 92 Ill.App.3d 99, 47 Ill.Dec. 507, 415 N.E.2d 512 (1980); *National Surety Corp. v. Sanders*, 53 Ala.App. 405, 301 So.2d 93 (1974); *Maryland Cas. Co. v. Wilson*, 6 Ariz.App. 470, 433 P.2d 650 (1967); for collected cases, see generally, 8 Appleman, *Insurance Law and Practice* Section 4812 (1981).

How did Stapleton lose? The district court appears to have recognized the above authorities, but concluded that

> [i]n other cases, such as where the injured third party is not an intended beneficiary or becomes a policy beneficiary only upon securing a judgment against the insured, then a settlement between the insured and his insurer prior to such time as the third party acquires the status of a policy beneficiary or judgment creditor would not affect the third party's "rights" in the policy as he has no "rights."

Cowley, 812 F.Supp. at 1458-59. This proposition might have some slight credibility had the district court been able to cite these "other cases." Stapleton has found no such authorities and apparently neither could the district court.

Indeed, if Stapleton had "no present interest" in the insurance contract, as the district court insisted, he could not be a Rule 19 party. The one truly bizarre feature of

this case is that the district court, having dismissed the coverage issues between the parties, failed to dismiss Stapleton as a party. Stapleton was either a party who could defend coverage issues, or he was not. If he was not, he could not be a party then bound to a judgment of the court.

As Judge Posner explained, the point is that Stapleton had an inchoate right, and it is the injured person's inchoate rights under insurance contracts which make them Rule 19 parties. These same inchoate rights are those which every court having considered the question has protected from infringement by "agreements" between insureds and insurers.

There is no Mississippi case directly on point. *Womack v. Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233 (1957), was a case where the injured third person was neither a contractual third party beneficiary nor had he obtained a judgment at the time of the purported policy "rescission." The Texas Supreme Court voided the agreement with so little explanation as to reflect both the obviousness and fundamental fairness of the general rule.

Of course, this Court is the federal high court and therefore relatively less concerned with state law issues. However, the lower court granted relief not cognizable under the state substantive law of Texas and most likely of Mississippi. Lacking a source of law to create a "case or controversy," Lloyd's Underwriters had no Article III standing to request or be granted such relief. Once again, grave concerns, founded in federalism and the Article III limitations on federal power, present themselves in this case.

III. The district court's opinion and the Court of Appeals' affirmance open the door for an abusive use of the Declaratory Judgment Act in the vast majority of states which do not permit direct actions against an insurer.

The vast majority of states forbid an injured claimant to sue the insurer directly. That being so, the pattern of this case is easily replicated in federal court: a declaratory judgment action joins the insured and the injured party as defendants. The insurer "settles" with the insured, rescinding the contract, and then, based on the authority of this case, asserts that in a contract case the two parties may deal with the contract in any way they see fit. Further, the reasoning will go, the controlling state law does not permit direct actions against an insurer and thus the injured party's claims will not lie. Therefore, the analysis concludes, injured persons have no standing to raise claims regarding the contract and may be bound by the agreement of the contract's parties.

Given the superficial syllogistic appeal of this reasoning, the consequences of the district court's opinion and the Court of Appeals' blithe affirmance reach well beyond this controversy. If this Court does not hear this case, much additional litigation involving the misuse of the Declaratory Judgment Act by insurers seeking to limit exposure will result. A later remedy will be far more socially costly.

The district court's principle sin in this case was retaining jurisdiction of a case where the declaratory judgment could not settle the controversy. The district court permitted the Declaratory Judgment Act to be used

not to construe the language of a contract and apply it to parties before it, but to purport to bind a non-settling third party to the agreement of other parties.

As a result, the district court entered a judgment which is incapable of terminating the legal proceedings under applicable state law. That result cannot possibly comport with the general standard that a declaratory judgment "serve a useful purpose in clarifying and settling the legal relations in issue, and . . . terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Omaha Property & Cas. Ins. Co. v. Johnson,* 923 F.2d 446, 447 (6th Cir. 1991), *quoting Grand Trunk Western R. Co. v. Consolidated Rail Corp.,* 746 F.2d 323 (6th Cir. 1984).

Nearly identical infirmities to those present in this case are discussed in *Empire Fire and Marine Ins. Co. v. Goodman,* 412 P.2d 569 (Mont. 1966). That decision affirmed a trial court's refusal to entertain jurisdiction under Montana's version of the Uniform Declaratory Judgment Act. The comment to Fed.R.Civ.P. 57 suggests that states' interpretations of the Uniform Declaratory Judgment Act are persuasive authority for the similar federal act.

In *Goodman,* the insurer filed a declaratory judgment action in state court against the insured asking the court to declare that the policy provided no coverage since it was not validly formed. Of course, in this case, the plaintiff insurer claims that the parties' agreement rescinded any coverage which might have existed.

The *Goodman* Court implicitly found that inchoate rights of injured parties in the tortfeasor's insurance vest

at the time of the injury. The Court quoted with approval the trial judge's holding: " '[I]t is difficult for the Court to conceive of any possibility wherein the defendant could have his policy terminated by plaintiff 24 days after the termination date of said policy, and effect a cancellation . . . that would be effective as against either the insured of a third party claiming thereunder.' " *Id.* at 570.

The trial court refrained from taking jurisdiction of the declaratory judgment action because the court believed that the relief requested was not cognizable under Montana law. Therefore, a declaratory judgment would be incapable of terminating the controversy. These are the identical conditions obtaining in this case.

The Montana Court quoted with approval the remarks of a trial court in a similar case: " 'This is the most bastard suit I have ever seen, to tell the truth.' " *Goodman*, 412 P.2d at 572.

Respectfully submitted,

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13 June 1994

App. 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7138

SEAMUS IAIN COWLEY,
Individually and as representative
for other underwriters, ETC.,
Plaintiff-Counter-Defendant-Appellee,

versus

WILLIAM WADELL STAPLETON,
Individually and as representative for the
Class Claimants in pending cause
No. 15,445, ETC.,
Defendant-Counter Claimant-
Cross Claimant-Third Party
Plaintiff-Appellant,

versus

TEXAS SNUBBING CONTROL, INC.,
Cross-Defendant-Appellee,

versus

JIM HATCHINGS,
Third Party Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA J89 32)

(Filed Jan. 17, 1994)

Before JONES and DeMOSS, Circuit Judges and COBB*, District Judge.

PER CURIAM:**

Having considered the briefs and arguments of counsel, this court finds no reversible error of fact or law in the district court opinion and affirms on the basis of that court's careful analysis of the case.

AFFIRMED.

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* District Judge of the Eastern District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SEUMAS IAIN COWLEY, INDIVIDUALLY, AND AS REPRESENTATIVE FOR OTHER UNDERWRITERS SUBSCRIBING TO POLICY NO. 523928506 PLAINTIFFS

VS. CIVIL ACTION NO. J89-0032(L)

TEXAS SNUBBING CONTROL, INC., a Texas Corporation, GARY KNOSTMAN, TRUSTEE OF THE ESTATE OF BANKRUPTCY OF TOMLINSON INTERESTS, INC., a Texas Corporation, AND WILLIAM WADDELL STAPLETON, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THAT CLASS OF CLAIMANTS IN PENDING CAUSE NO. 15445, IN THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI AND ALL OTHER SIMILARLY SITUATED DEFENDANTS DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed December 8, 1992)

This cause is before the court on the motion of plaintiff Seumas Iain Cowley, individually and as representative for other Underwriters subscribing to Policy No. 523928506 (Underwriters), to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. That motion has been joined in by defendant

Texas Snubbing and third-party defendant Jim Hutchings. Underwriters have also filed a separate motion for summary judgment, and there is pending a motion by defendant William Waddell Stapleton, individually and as representative for that class of claimants in pending Cause No. 15,196 in the Circuit Court of Rankin County, Mississippi and all other similarly situated defendants, to set aside an order of dismissal entered by the court on December 12, 1991 and for order declaring the order of dismissal void ab initio and of no legal effect.[1] These motions are largely interrelated in terms of the issues which the court is called upon to consider.

BACKGROUND

This case arises out of a July 15, 1985 above-ground blowout of the E. N. Ross #2 Well located in the Johns Field in Rankin County, Mississippi. Defendant Gary K.

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[1] There was previously pending an application by Stapleton for review of a magistrate judge's order denying additional discovery and a further motion by Stapleton for an order staying or holding in abeyance Underwriters' motion for summary judgment until completion of discovery. This court denied Stapleton's application for review and determined that certain of the issues raised by Underwriters' motions would be addressed first and, depending upon the resolution of those issues, i.e., if the issues were decided in Stapleton's favor, further attention would be given to Stapleton's request that he be permitted to conduct further discovery before responding to the summary judgment motion as it pertained to the remaining issues. Therefore, the only issues presently under consideration by the court are those issues relating to the effect, as against Stapleton, of the settlement effected between Underwriters and Texas Snubbing.

Knostman, as trustee of the bankruptcy estate of Tomlinson Interests, Inc.,[2] was the operator of the well. Texas Snubbing Control, Inc. (Texas Snubbing) was the snubbing contractor hired by Knostman that was on-site when the blowout occurred. At the time of the blowout, Texas Snubbing was insured under two policies of insurance issued by Underwriters providing for indemnification against liability incurred by Texas Snubbing, as well as payment of defense costs for covered claims. These included a primary policy with coverage limits of $500,000, and a $2,000,000 umbrella policy, No. 523928506.

The blowout generated numerous lawsuits against Knostman, Texas Snubbing and others, including a number of suits filed in the Circuit Court of Rankin County by residents of Rankin County who lived in the vicinity of the well seeking recovery for bodily injury and property damage alleged to have resulted from the blowout and consequent escape of hydrogen sulfide and other toxic gases. The first wave of landowner suits, consolidated under Master Cause No. 15,002, resulted in a settlement pursuant to which Underwriters paid $750,000 on behalf of its insured, Texas Snubbing. Underwriters subsequently paid an additional $50,000 on behalf of Texas Snubbing in settlement of an action filed by another group of landowners. A third group of suits filed by 281

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[2] Tomlinson filed for protection under the United States Bankruptcy Code in Texas in June 1984, following which Knostman, as trustee, conducted the business affairs of Tomlinson, including the drilling of the E. N. Ross #2 Well.

landowner plaintiffs, including William Waddell Stapleton, were consolidated under Master Cause Number 15,196, *Stapleton, et al. v. Halliburton, et al.* The plaintiffs in Master Cause Number 15,196, as had the plaintiffs in the earlier suits, named as defendants various entities associated with the well, including Knostman and Texas Snubbing. They alleged personal injuries and property damages resulting from the blowout and demanded damages in excess of $1,000,000,000. That case is currently pending in the state circuit court.

In addition to the landowners' suits, Texas Snubbing filed an action against Knostman in the Circuit Court of Rankin County, seeking indemnification from Knostman based upon an indemnity provision in Texas Snubbing's work order with Knostman, and seeking to recover monies which Texas Snubbing had been or might be required to pay as a result of the blowout. Knostman counterclaimed against Texas Snubbing, demanding in excess of $10,000,000 for indemnification from Texas Snubbing and damages for, *inter alia*, loss of gas, well control and redrilling expenses, evacuation expenses and lost profits.

PROCEDURAL HISTORY

In consideration of the various claims that third parties had asserted against Texas Snubbing, and in particular the claims by Knostman and the Stapleton plaintiffs, and in view of Texas Snubbing's demand for coverage and defense as provided by Underwriters' policy, Underwriters filed this declaratory judgment action seeking an adjudication that its umbrella policy, which contains

exclusions for seepage and pollution, loss of hole, cost of control, removal of debris and punitive damages, provides no coverage for these claims and that consequently, Underwriters have no obligation to indemnify their insured, Texas Snubbing, or to pay any sums to Knostman or the landowner claimants on behalf of Texas Snubbing.[3]

In his original answer to the Underwriters' complaint for declaratory relief, filed May 11, 1989, Stapleton alleged that the policy issued by Underwriters in effect at the time of the accident did in fact provide coverage for his damages and he charged that Underwriters were in any event estopped from denying coverage for his claims since Underwriters had paid substantial sums to other landowners upon claims similar to Stapleton's.[4]

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[3] Underwriters sought by their complaint a judicial determination of the following issues:

a. That the Underwriters have no liability to Texas Snubbing under the Policy for the claims in question because the Policy excludes coverage for loss of hole, cost of control, removal of debris, seepage and pollution of whatsoever nature, underground resources, and punitive damages;

b. That Knostman's counterclaim against Texas Snubbing is excluded by the Policy under the provisions relating to cost of control, loss of hole, seepage and pollution of whatsoever nature, and underground resources; and

c. That the seepage and pollution exclusion contained in the Policy, along with other exclusions contained therein, excludes any liability of the Underwriters to the class of Claimants named herein.

[4] By order dated December 20, 1989, a defendant class was certified over Stapleton's objections. The class was ordered to consist of "the claimants in pending cause number 15,196 in the

On May 7, 1990, Texas Snubbing answered Underwriters' complaint and, like Stapleton, denied Underwriters' allegations of noncoverage. Texas Snubbing included with its answer a counter-claim against Underwriters, in which it contended that the policy in effect at the time of the blowout did provide coverage for the claims being made against it by various parties, but that after the blowout, Underwriters, in dereliction of its duties to Texas Snubbing, attempted to "amend" the policy by adding exclusions (or substituting another policy which contained exclusions) which were not in the policy when the blowout occurred. Texas Snubbing demanded not only indemnity for claims it might be required to pay, but also demanded punitive damages for this alleged wrongful and malicious conduct of Underwriters.[5]

Circuit Court of Rankin County, Mississippi, and all others similarly situated." All references herein to Stapleton are intended to include all those persons comprising the defendant class.

[5] It appears from the record that during the course of discovery, it was learned that two policies had actually been issued to Texas Snubbing, one which contained the exclusions relied on by Underwriters and one which contained some but not all of the exclusions. In support of their motion for summary judgment, Underwriters have submitted an affidavit of Michael Judd, a managing director of Devitt (Energy) Ltd., a Lloyd's of London brokerage house, in which Judd undertakes to set forth the events which led to the issuance of two policies. According to Judd, he was approached in 1984 by RISC, a Texas insurance broker, about placing $2.5 million in liability insurance coverage for Texas Snubbing. He obtained a quote for the coverage and conveyed the quote to RISC, but did not receive instructions from RISC to bind the coverage. In May 1985, according to Judd's affidavit, he was again approached by RISC about obtaining insurance coverage for Texas Snubbing. When RISC,

A settlement was effected between Underwriters and Texas Snubbing in August 1991, under the terms of which Underwriters agreed to pay to Knostman $360,000 on Texas Snubbing's behalf in order to resolve Knostman's claim for damages against Texas Snubbing, this being, according to the terms of the settlement agreement, "the

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which apparently – and according to Judd, erroneously – thought that coverage had been bound earlier, learned that was not the case, RISC inquired whether coverage could be obtained retroactive to October 1984. Judd states that he was able to persuade certain underwriters – a different group of underwriters from those who had originally quoted the coverage in October 1984 – to bind the coverage retroactively as requested, subject to a warranty by Texas Snubbing that no known or reported losses had occurred prior to May 17, 1985. Coverage was thus placed in May 1985, but the policy itself was not physically prepared and issued until sometime after the blowout had occurred. The policy which was issued incorporated two endorsements, "Umbrella Oil Exclusions – 2nd April 1985" and "Named Peril Seepage and Pollution Endorsement," both of which excluded pollution and seepage coverage in connection with the blowout and both of which, according to Judd, were intended by Underwriters and Texas Snubbing.

Though Stapleton has not formally responded to the coverage aspect of Underwriters' motion for summary judgment, and has instead requested that he be allowed further discovery into the facts surrounding the issuance of the policy or policies prior to responding to the motion as it relates to those issues, his position on this point has been made clear. That is, Stapleton maintains that the policy issued by RISC was the policy in effect at the time of the blowout and that Underwriters fraudulently substituted another policy in order to avoid coverage for the blowout. The court recites the content of Judd's affidavit only for the purpose of placing in perspective the issues presented by the parties' motions.

most significant claim[ ] against [Texas Snubbing]."[6] Further, Underwriters agreed to pay to Texas Snubbing the sum of $15,000 in settlement of Texas Snubbing's bad faith claim, and in connection with that aspect of the settlement, those parties agreed as follows:

> Texas Snubbing and its president, Jim Hutchings, hereby ratifies (sic) the acts of its agent Devitt (Energy) Ltd. in negotiating, drafting and physically assembling the aforementioned policy, and release Underwriters from any and all claims it may have or may have in the future under the policy, including, but not limited to, any and all claims arising out of the blowout of the E. N. Ross Well #2 in Rankin County, Mississippi, and including, but not limited to, the claim of William Waddell Stapleton, and other members of the class of plaintiffs (in original) that have been certified as a class in *C. O. Gibb, et al v. Texas Snubbing Control, Inc., et al.*, as described above, any claims of Knostman, including but not limited to any claims asserted by Knostman for indemnity, the claim of Murco Drilling Company, and any claims of any other party for damages, contribution, or indemnity. Texas Snubbing and Jim Hutchings agree to a full and final release and discharge of any liability of Underwriters as set forth above, including a full an final release of any claim it may have against any employees, agents, attorneys, reinsurers or other insurers of underwriters in connection with the placement or handling of claims under the policy.

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[6] Texas Snubbing and Knostman entered into a separate settlement agreement.

In October 1991, shortly after this settlement was reached, Underwriters moved for summary judgment contending that it was entitled to judgment on its claim against Stapleton since his claims were excluded from coverage by the policy in effect at the time of the blow-out. Underwriters asserted alternatively that Stapleton was precluded in any event from recovering under the policy since his claims, being derivative in nature, were barred because Texas Snubbing had released all of its claims against the policy.

On December 2, 1991, Stapleton, having learned of the settlement between Texas Snubbing and Underwriters, filed an amended answer and counterclaim against Underwriters, a cross-claim against Texas Snubbing and a third-party complaint against Texas Snubbing's president, Jim Hutchings, asserting, in addition to his claim for recovery against Underwriters under the subject insurance policy, a claim that these parties, by entering into the settlement agreement, had colluded and conspired to defraud Stapleton of his rights to recovery under that policy.[7] Underwriters, joined by Texas Snubbing and Jim

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[7] On December 12, 1991, at the request of the parties to the settlement, this court entered an order dismissing Texas Snubbing's counterclaim against Underwriters, and dismissing Texas Snubbing from this action. As Stapleton had previously asserted his cross-claim against Texas Snubbing relating to its part in the allegedly unlawful settlement, and as this court's order of dismissal purported to dismiss Texas Snubbing from the case, Stapleton moved to set aside the court's dismissal order so that he could pursue his cross-claim against his codefendant. The court is of the opinion that Stapleton's request is well taken as the court did err in ordering that Texas Snubbing be dismissed from the case in light of Stapleton's claim against Texas Snubbing.

Hutchings, has moved to dismiss Stapleton's amended counterclaim against it (Texas Snubbing and Jim Hutchings have requested dismissal of Stapleton's cross-claim and third-party complaint, respectively) for failure to state a claim upon which relief can be granted.

MOTION TO DISMISS

In his amended counterclaim against Underwriters, Stapleton asserts, *inter alia*, what is essentially a claim for a declaratory judgment that he is entitled to coverage under the umbrella policy issued by Underwriters. He avers not only that the policy by its terms provides coverage, but also that Underwriters, having represented that Texas Snubbing had liability coverage for the blowout and having paid out over $1,000,000 to other claimants on Texas Snubbing's behalf, are (sic) estopped now from denying coverage for his claims. Stapleton further maintains that Underwriters are guilty of bad faith, and of violating the Texas Deceptive Trade Practices Act, in connection with its denial of his claims, since that denial was based on a fraudulent and deceitful post-accident modification or substitution of the insurance contract designed to avoid coverage. And he claims that by entering into the settlement agreement, Underwriters, together with Texas Snubbing and Jim Hutchings, conspired and colluded to deceive and defraud Stapleton and deprive him of insurance coverage to which he is entitled. As

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However, while Stapleton should not have been prevented by the court's order from pursuing his claim against Texas Snubbing, as the court concludes *infra*, Stapleton cannot *prevail* on his cross-claim against Texas Snubbing.

relief, Stapleton demands payment of the limits under the policy, actual and punitive damages, treble damages, and an order enjoining, or if already consummated, setting aside the settlement agreement.[8]

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[8] The counterclaim against Underwriters contains nine counts. Count 1 essentially seeks a declaratory judgment that coverage under the policy should be afforded to Texas Snubbing for Stapleton's claims. In Count 2, Stapleton demands that Underwriters be ordered to pay actual damages and punitive damages, in addition to the limits of the umbrella policy, based on his contention that Underwriters have acted in bad faith in delaying, failing and refusing to pay Stapleton's claims. More specifically, he contends that Underwriters altered their policies after the blowout so as to exclude coverage, delayed payment of their claims and engaged in a course of conduct designed to reduce available coverage by paying their attorneys to delay the litigation and litigate the claims against Texas Snubbing, thereby reducing the amount of coverage available to him. In Count 3, Stapleton alleges that by these same acts, Underwriters have violated the Texas Deceptive Trade Practices Act, entitling Stapleton to an award of actual, punitive and treble damages.

Count 4 alleges a claim of promissory estoppel, i.e., that Stapleton detrimentally relied on the representation of coverage by Underwriters, which issued policies that were represented to extend coverage to Texas Snubbing for its negligent acts in connection with the blowout. He claims that Underwriters are consequently estopped from claiming the policies issued do not provide coverage to Texas Snubbing and are estopped from asserting that the settlement extinguished Stapleton's rights under the policies. Stapleton demands, in Count 5 of his amended counterclaim, an accounting of all sums paid under the policies for claims of other parties, as well as attorney's fees, and an accounting of how much insurance coverage remains available to Texas Snubbing.

In Count 6, Stapleton charges that the settlement agreement entered between Underwriters, Texas Snubbing and Jim Hutchings was designed to deceive and defraud him and deprive him of his right to insurance coverage, and that for its acts of bad

Standing

Underwriters seek dismissal of Stapleton's counterclaim on the basis that he has no rights under the insurance policy at issue and thus is without standing to complain of the disposition of policy proceeds as between Underwriters and Texas Snubbing. Stapleton is not a named insured under the subject insurance policy, nor is he an additional insured. And in the court's opinion, Stapleton is not a third-party beneficiary of the insurance contract. In short, Stapleton has no present interest in the insurance contract between Underwriters and Texas Snubbing. Consequently, whether Mississippi or Texas law is applied,[9] it is clear that Stapleton has no standing

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faith in this regard, Underwriters is liable for actual and punitive damages. Count 7 is essentially the same in substance as Count 6, but contains an additional allegation that the parties to the settlement "conspired" to deceive and defraud Stapleton and "cheat" him of his right to insurance coverage. Count 8 also charges fraud and conspiracy among those parties, but demands as relief that the proposed settlement be enjoined, or if already consummated, then set aside. Finally, Stapleton requests, in Count 9, as in Count 8, that the settlement agreement, which was unlawful and fraudulent and against public policy, be declared null and void and of no legal effect.

[9] Stapleton insists that either Texas or Mississippi law applies to all of the issues in this case and expends much of his briefing efforts attempting to convince the court that "English law should not be applied to any aspect of this matter." Previously in this case, the court ruled in connection with a discovery dispute that English law governed the limited issue of whether a London broker who negotiated an insurance contract with Lloyd's underwriters in London was an agent of the assured or the underwriters. The court has never suggested that English law applied to other aspects of this case and the court has not intimated that English law would apply to the issues presently

to pursue a claim for insurance coverage or for bad faith, nor does he have standing to challenge the settlement agreement between Underwriters and Texas Snubbing.

One who is not a party to a contract of insurance may nevertheless have standing to enforce the contract if the contract was made for that person's benefit. *See Quilter v. Wendland*, 403 S.W.2d 335, 337 (Tex. 1966). Legally intended beneficiaries of an insurance contract, for example, may sue to recover on the contract, *see Dairyland County Mut. Ins. Co. v. Childress*, 650 S.W.2d 770, 775-76 (Tex. 1983), as may judgment creditors of the insured, who are considered intended third-party beneficiaries of the insured's policy, *see Roland v. Allstate Ins. Co.*, 370 F.2d 289, 291 (5th Cir. 1966) (injured party who acquires judgment against tortfeasor may sue tortfeasor's insurer directly to enforce the judgment up to the limits of the policy); *see also Cumis Ins. Soc'y v. Republic Nat'l Bank*, 480 S.W.2d 762, 767 (Tex.Civ.App. – Dallas 1972, writ ref'd, n.r.e.). It is thus manifest under Texas law, as well as Mississippi law, that in the absence of his having secured

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under consideration by the court. In this regard, it is clear that when the court must resort to conflicts rules, it must do so on an issue by issue basis, for the determination of what state's laws will apply will not necessarily be the same for every issue in a given case. *See Boardman v. United Services Auto Ass'n*, 470 So. 2d 1024, 1032 (Miss. 1985) (choice of law factors to be evaluated in accordance with their importance with respect to the particular issue). The court need not resolve whether the law of Texas or that of Mississippi would apply to issues concerning the effectiveness of the settlement between Underwriters and Texas Snubbing as against Stapleton since, regardless of which state's law is applied, the result reached would be no different.

a judgment against Texas Snubbing, or his having otherwise established Texas Snubbing's liability for his damages, Stapleton has no standing to bring an action for recovery under Texas Snubbing's insurance policy. Under the laws of both states, persons injured by an insured are not third-party beneficiaries of the insurance contract before a judgment is obtained against the insured, in the absence of a statute or contractual provision establishing that third party's status as an intended third-party beneficiary. Injured third parties can be intended third-party beneficiaries of insurance contracts only where contractual or statutory provisions grant those third parties rights in the insurance agreement. And only those who occupy the status of third-party beneficiaries are permitted a cause of action against the insurer without first having established the insured's liability by judgment or otherwise. *See International Trucking Co. v. Employers Casualty Co.*, No. 04-90-00012-CV (Tex.Civ.App. – San Antonio July 8, 1992) (a third party has no direct action against an insurer on the insurance policy absent a determination of liability on the part of the insured); *Russell v. Hartford Casualty Ins. Co.*, 548 S.W.2d 737 (Tex.Civ.App. – Austin 1977, writ ref'd, n.r.e.) (in absence of statute or express provision of insurance contract, insurer cannot be sued directly in tort suit); *State Farm County Mut. Ins. Co. v. Ollis*, 768 S.W.2d 722, 723 (Tex. 1989) (injured third party cannot enforce policy directly against insurer until insured's legal obligation to pay damages has been established by judgment or agreement); *Samford v. Allstate Ins. Co.*, 529 S.W.2d 84 (Tex.Civ.App. – Corpus Christi 1975, writ ref'd, n.r.e.) (if injured third parties had no direct cause of action against liability insurer, they were not

third party beneficiaries of such action by insured); *Bluth v. Neeson*, 127 Tex. 462, 94 S.W.2d 407 (Tex. 1936) (injured third party had no right of action on automobile liability policy, which was personal to insured); *Westmoreland v. Raper*, 511 So. 2d 884, 885-86 (Miss. 1987) ("benefit to a third party contemplated by insurance policies is contingent upon a judgment being awarded for which the insurance company may or may not be liable under the terms of the agreement."); *Jordan v. State Farm Mut. Ins. Co.*, 774 F. Supp. 424, 426-27 (S.D. Miss. 1991), *aff'd*, 946 F.2d 1084 (5th Cir. 1991) (same); *cf. Dairyland County Mut. Ins. Co. v. Childress*, 650 S.W.2d 770, 775-76 (Tex. 1983) (third parties injured in automobile accident are within the class of legally intended beneficiaries of insurance policy purchased to satisfy statutory insurance requirements of financial responsibility law); *Conoco, Inc. v. Republic Ins. Co.*, 819 F.2d 120, 124 (5th Cir. 1987) (third party lacked standing to bring action on policy where he was prevented from becoming third-party beneficiary by policy provision excluding right of third party to bring action on insurance policy).

There is no question but that Stapleton is not a third-party beneficiary of the insurance contract between Underwriters and Texas Snubbing. Stapleton has cited the court to no statute or provision in the insuring agreement granting him rights in the policy prior to securing a judgment or granting him the right to file suit against Underwriters for recovery under the policy prior to his obtaining a judgment against the insured. In other words, the insurance coverage provided by Texas Snubbing's policy was not mandated by law, and the court has not

been directed to any provision of the policy which suggests that the insurance contract was secured for the benefit of any third party to the contract. Rather, it appears that the policy of insurance was purchased for Texas Snubbing's own benefit, as well as for the benefit and protection of Tomlinson.[10] Though Stapleton has filed suit against Texas Snubbing in state court alleging that it was negligent, he has not recovered a judgment against Texas Snubbing, and indeed, may never do so. There has been no determination that Texas Snubbing was negligent, or that if it was, any such negligence caused or contributed to any injuries these persons may have sustained. Under these circumstances, it must be concluded that Stapleton is not a third-party beneficiary of the insurance contract and therefore lacks standing to maintain any claim against the insurance policy.[11] Thus, only if Stapleton were to secure a judgment against Texas Snubbing would he be in a position to maintain a direct action against Underwriters on the insurance contract.

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[10] It does appear that Tomlinson required that Texas Snubbing procure insurance coverage in order to perform work at the well site, but there is no basis for the court to conclude that Tomlinson did so to protect third parties from Texas Snubbing's negligence. Rather, it appears that this requirement was imposed for Tomlinson's own protection and benefit.

[11] Stapleton also lacks standing to challenge Underwriters' denial of policy benefits on the basis of their having paid out monies to other landowner claimants on behalf of Texas Snubbing under its policy. *Cf. Hunt v. Preferred Risk Mut. Ins. Co.*, 568 So. 2d 253 (Miss. 1990) (due to state's proscription against direct actions, third party to insurance contract had no standing to raise issues of promissory estoppel in absence of evidence that she acquired insured's claims by assignment or levy).

It is also clear that whether Mississippi or Texas law is applied, Stapleton has no standing to assert a claim of bad faith against Underwriters for its handling of his claim for benefits. A common law claim of bad faith is predicated on Underwriters' breach of a duty of good faith and fair dealing, and no such duty is owed Stapleton under the policy at issue. Both of these states recognize that an insurance carrier owes a duty under its insurance policy only to its insureds and to intended beneficiaries of the insurance contract. *See Westmoreland,* 511 So. 2d at 884; *Arnold v. National County Mut. Fire Ins. Co.,* 725 S.W.2d 165 (Tex. 1987); *Chaffin v. Transamerica Ins. Co.,* 731 S.W.2d 728, 731 (Tex.Civ.App. – Houston [14th Dist.] 1987, writ ref'd, n.r.e.). Therefore, any interest which Stapleton might have – or here, acquire – in the policy could extend no further than the limits of liability provided under the policy. *See Watson v. Allstate Ins. Co.,* 828 S.W.2d 423 (Tex.App. – Ft. Worth 1991) (insurer owed third-party beneficiary no common-law duty of good faith and fair dealing); *Bowman v. Charter General Agency, Inc.,* 799 S.W.2d 377 (Tex.App. – Corpus Christi 1990, writ denied) (outside worker's compensation area, no Texas court has extended insurer's duty of good faith and fair dealing to provide remedy to an injured third party having no contractual relationship with insurer); *Caserotti v. State Farm Ins. Co.,* 791 S.W.2d 561, 566 (Tex.App. – Dallas 1990, writ denied) (insurer does not owe duty of good faith and fair dealing to third-party claimant under its insured's policy, even where that third party is also an insured); *Chaffin,* 731 S.W.2d 728 (common law duty of good faith and fair dealing running from insurer to insured does not extend to provide remedy to injured

third party; direct action by third party may lie against carrier after injured party has secured judgment against the insured, but insurer's liability is limited to amount of policy); *Samford v. Allstate Ins. Co.*, 529 S.W.2d 84, 87 (Tex.Civ.App. – Corpus Christi 1975, writ ref'd, n.r.e.) (without any cause of action against insurer on policy due to proscription against direct actions, third parties could not complain of negligence or gross negligence on part of insurer for failure to settle within policy limits); *Jordan*, 774 F. Supp. at 426 (Mississippi's proscription against direct actions precluded action by third party for carrier's alleged unreasonable refusal to pay under tortfeasor's insurance policy).

Because he is not a third-party beneficiary of the subject insurance policy, Stapleton is also precluded from proceeding against Underwriters on his claim which is premised on alleged violations of the Texas Deceptive Trade Practice Act.[12] In a case analogous to the one at bar, a Texas appellate

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[12] Stapleton argues in his brief in opposition to Underwriters' motions that he has standing under Texas law to challenge the settlement agreement under that state's Deceptive Trade Practices Act and under the Texas Insurance Code. A careful review of Stapleton's amended answer, counterclaim, cross-claim and third-party complaint, however, reveals that he has not alleged any cause of action under either the Texas Deceptive Trade Practices Act or under the Texas Insurance Code relating to the settlement agreement. Though Stapleton does not identify which provision of this Act he claims was violated by Underwriters, he does allege in his counterclaim against Underwriters that Underwriters violated the Deceptive Trade Practices Act by their alleged post-blowout alteration of the subject insurance policies. However, the only claims he has charged relating to the settlement are *common law* claims of fraud and conspiracy. For the reasons stated in the text, though, even if he had asserted a

court granted summary judgment for the insurer based on its conclusion that plaintiffs had no contractual relationship with their subcontractor's insurer, and were not intended third-party beneficiaries of the insurance contract. In *Chaffin, supra,* plaintiffs sued a subcontractor they had hired for damages caused by negligence in the subcontractor's performance of its duties. The plaintiffs also sued the subcontractor's liability insurer, claiming that Texas law recognized an independent cause of action by a third party against a tortfeasor's insurance carrier arising from the carrier's wrongful denial of coverage. The court held that "[t]he liability policy held by [their subcontractor] was purchased solely for [its] benefit," and consequently, the plaintiffs "derive[d] no legal relationship from the . . . insurance contract" between the subcontractor and its insurer. *Id.* at 731. The court explained:

> Texas courts are in accord both that an injured party has no direct cause of action against a tortfeasor's insurance carrier, whether or not the insured party is joined; and that the carrier owes a legal duty only to its insured or to an intended beneficiary of the policy. See, *e.g., Aetna Cas. & Sur. Co. v. Marshall,* 724 S.W.2d 770 (Tex. 1987) (claimant, an injured worker, sued a workers' compensation carrier under Tex.Ins.Code Ann. art. 21.21; claimant was statutorily intended beneficiary); *Dairyland County Mut. Ins. v. Childress,* 650 S.W.2d 770) (Tex. 1983) (claimants were statutorily intended beneficiaries of auto liability coverage); *Aetna Cas. & Sur. Co. v. Martin Surgical,* 689 S.W.2d 263 (Tex.App. – Houston

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statutory claim regarding the settlement agreement, he could not maintain that claim.

> [1st Dist.] 1985, writ ref'd n.r.e.) (surgical supply company claimant was additional insured); *Becker v. Allstate Ins. Co.*, 678 S.W.2d 561 (Tex.App. – Houston 14th Dist. 1984, writ ref'd n.r.e) (tort plaintiff had not standing to sue carrier); *Russell v. Hartford Cas. Ins. Co.* 548 S.W.2d 737 (Tex.Civ.App. – Austin 1977, writ ref'd n.r.e.) (third party claimants were not permitted to sue insurance carrier directly in tort, *with or without joinder of insured party*); *Samford v. Allstate Ins. Co.*, 529 S.W.2d 84 (Tex.Civ.App. – Corpus Christi 1975, writ ref'd n.r.e.) (insured's judgment creditors were not third party beneficiaries and thus could not complain of carrier's failure to settle).

Chaffin, 731 S.W.2d at 731-32. Stapleton argues that irrespective of *Chaffin*, he may maintain his Texas Deceptive Trade Practices Act claim against Underwriters, citing two Texas decisions, *International Trucking Co. v. Employers Casualty Co.*, No. 04-90-000120CV (July 8, 1992), and *Watson v. Allstate Insurance Co.*, 828 S.W.2d 423 (Tex.App. – Ft. Worth 1991). In *International Trucking*, a third party whose vehicle was damaged in an accident with an insured under a policy of automobile liability insurance was contacted after the accident by a representative of Employers, the insurance carrier, and was advised to have the vehicle repaired. Only after the repairs had been completed was the third party informed by the carrier that it would not pay his repair bill since the carrier had determined that its insured was not liable for the collision. Without first having obtained a judgment against the insured, or having otherwise established the insured's liability for the accident, the third party brought suit against Employers alleging that Employers had violated article 21.21 of the Texas Deceptive Trade Practices Act by making numerous misrepresentations in its handling of the repair of his truck. The central issue

confronted by the Court was whether that third party had standing to bring a statutory cause of action against the insurance carrier for committing an unfair claims settlement practice under the Texas Insurance code. The court determined that the third party did, in fact, have standing, even though he had not obtained a judgment against the insured, reasoning that his claim was not a suit on the insurance policy but was a statutory cause of action predicated on the carrier's false, misleading or deceptive acts and practices. The court observed that under Texas law, "[a] non-insured third party has standing to sue for the damages it suffered by relying on the representations of coverage made by an insurance company," *International Trucking*, slip op. at 7 (citing *Hermann Hosp. v. National Standard Ins. Co.*, 776 S.W.2d 249, 252 (Tex.App. – Houston (1st Dist.] 1989)), and concluded that the injured party, who was by law an intended third-party beneficiary of the insured's insurance policy, could recover against the carrier for its misrepresentations under the Texas Deceptive Trade Practices Act.

In *Watson*, another Texas appellate court held that a third-party beneficiary of an automobile liability insurance policy who had not yet obtained a judgment against an insured had standing to bring a cause of action directly against the insurance carrier under the Texas Insurance Code for the carrier's alleged unfair settlement practices. The court found that while the injured third party had no common law cause of action against the carrier since the carrier owed her no common law duty of good faith and fair dealing, she nevertheless could proceed against the insurer on her statutory claim.

The fact that immediately distinguishes this case from *International* and *Watson* is that Stapleton is not a third-party beneficiary of Texas Snubbing's insurance policy. The *International Trucking* court specifically distinguished *Chaffin* on this basis, stating:

> The *Chaffin* court first made clear that the plaintiffs were not third party intended beneficiaries of the insurance contract. In doing so it distinguished *Dairyland*, 650 S.W.2d at 775-76, which held that third parties injured in a motor vehicle accident are within the class of legally intended beneficiaries on an insurance policy purchased to satisfy the statutory requirement. The *Chaffin* court held that the plaintiffs may have a claim against [the insurer] limited to the amount of the policy after securing a judgment against [the insured], but that they had no remedy under the Insurance Code, nor under a common law duty of good faith and fair dealing, because they were not intended beneficiaries of the policy. 731 F.2d at 732. . . . Of course, under *Dairyland*, persons injured in automobile accidents, such as International, are intended beneficiaries of the other party's insurance policy.
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> *Chaffin* is distinguishable on the ground that the plaintiffs in that case were not third-party beneficiaries. In addition, the insurer made no misrepresentations directly to the plaintiffs as Employers did in this case.

International Trucking, slip op. at 8-9. The *Watson* court similarly distinguished *Chaffin* "for the reason that the plaintiff in that case was not a third-party beneficiary of the policy," whereas Watson was such a third-party beneficiary. 828 S.W.2d at 430. As Stapleton is not a third-party

beneficiary, neither *Watson* nor *International Trucking* provides support for Stapleton's position that he may properly assert his claim against Underwriters. Instead, *Chaffin* furnishes the applicable rule and dictates the conclusion that Stapleton lacks standing in the case at bar.

The court further concludes, after thorough consideration of the issue, that since Stapleton has no present interest in the policy itself, he has no standing to challenge the settlement effected between Underwriters and Texas Snubbing. His right to object to the settlement, like his right to proceed against Underwriters on the policy itself, is dependent upon his first obtaining a judgment against Texas Snubbing. In *Alumax Mill Products, Inc. v. Congress Financial Corp.*, 912 F.2d 996, 1001-02 (8th Cir. 1990), the court explained that:

> In general, nonsettling defendants lack standing to object to a partial settlement. *See, e.g., Waller v. Financial Corp. of America*, 828 F.2d 579, 582 (9th Cir. 1987); *cf. Armstrong v. Adams*, 869 F.2d 410, 414 (8th Cir. 1989) (appellants who had been dismissed as defendants lack standing to object to settlement). 'In ordinary litigation, that is, lawsuits between private parties, courts recognize that settlement of the dispute is solely in the hands of the parties.' *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1189 (8th Cir. 1984), *citing United States v. City of Miami*, 614 F.2d 1322, 1330 & n.16 (5th Cir. 1980) ('special situations' which require court approval include proposed class action settlements, proposed shareholder derivative suit settlements, proposed compromise claims in bankruptcy court, and consent decrees in antitrust suits brought by United States), *modified on rehearing en banc*, 664 F.2d 435 (1981).

> 'However, in multi-party lawsuits, non-settling defendants often seek the court's intervention to invalidate or alter partial settlements.' *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1232 (7th Cir. 1983). 'There is therefore a recognized exception to the general principle barring objections by non-settling defendant to object where it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement.' *Waller v. Financial Corp. of America*, 828 F.2d at 583; *see Quad/Graphics, Inc. v. Fass*, 724 F.2d at 1232; *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 172 (5th Cir. 1979) (citing 3 H. Newberg, Newberg on Class Actions § 5660b, at 564-65 (1977), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3028, 69 L.Ed.2d 405 (1981); *cf. Armstrong v. Adams*, 869 F.2d at 414 ('plain legal prejudice' required to set aside voluntary dismissal under Fed.R.Civ.P.41(a); drawing analogy between settlement and voluntary dismissal).
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> Courts have recognized that 'a non-settling defendant has standing to object to a partial settlement which purports to strip it of a legal claim or cause of action, an action for indemnity or contribution for example.' *Waller v. Financial Corp. of America*, 828 F.2d at 583 (citations omitted); *cf. Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1223 (9th Cir. 1989) (nonsettling defendants have standing to appeal), *petition for cert. filed*, 59 U.S.L.W. 3055 (U.S. July 9, 1990) (No. 90-98).

Stapleton, as this court has already concluded, does not at this time have "a legal claim or cause of action," because of the proscription against direct actions against insurers, but at best has a potential cause of action against Underwriters for recovery on the insurance policy. Contrary to

his assertion, it is not the case that Stapleton's rights in the insurance policy have been damaged by the parties' having effected a settlement which is detrimental to his rights; rather, as Stapleton has no present interest in the insurance policy, the settlement at best could affect only potential rights. That is not sufficient to provide Stapleton standing to challenge the settlement agreement.[13]

Stapleton argues in opposition to the presently pending motions that Mississippi would recognize his claims as viable to the extent that he is not suing on the insurance contract itself, but rather is suing Underwriters for its independent intentional torts which it committed in issuing the policy and is suing Underwriters, Texas Snubbing and Jim Hutchings for their intentional torts in "conspiring" to enter into a settlement agreement to defraud Stapleton of his potential rights under the insurance policy. In support of his contention that he is entitled to maintain a tort claim against Underwriters for its independent and intentional torts in the claims handling process and against all of the parties for their torts in connection with their entering into the settlement agreement to deprive and defraud Stapleton of his right to recovery under the insurance policy, Stapleton cites

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[13] The court would note in any event that while Stapleton alleges generally that he has been "defrauded" by the settlement agreement entered by Texas Snubbing, Underwriters and Jim Hutchings, and more generally by representations of coverage, he has not specifically identified any misrepresentation or fraudulent conduct as required by Rule 8 of the Federal Rules of Civil Procedure, nor has he demonstrated that Underwriters or Texas Snubbing ever represented to him that there was coverage for his damages. In fact, the contrary appears.

Southern Farm Bureau Casualty Insurance Co. v. Holland, 469 So. 2d 55 (Miss. 1984). However, a similar argument was rejected by this court in *Jordan v. State Farm*, in which this court stated:

> The *Holland* case, in which the Mississippi Supreme Court permitted an injured employee to proceed against his employer's workers' compensation carrier for the carrier's intentional conduct in refusing to pay the employee's claim for weekly compensation and medical benefits, is clearly limited to claims by employees against workers' compensation carriers. The court's conclusion that *Holland* provides no support for plaintiff's position is demonstrated inferentially by the fact that the Mississippi Supreme Court in *Westmoreland*, decided some three years after *Holland*, noted that despite having had on numerous occasions the opportunity to do so, that court had "steadfastly refused" and would continue to refuse to permit a direct action against a liability insurer. *Westmoreland*, 511 So. 2d at 884.

Jordan, 774 F. Supp. at 426.

Stapleton also relies on *Bass v. California Life Insurance Co.*, 581 So. 2d 1087 (Miss. 1991), as support for his claim that he may properly pursue his claims in this case. In *Bass*, the Mississippi Supreme Court held that an insurance adjustor could be independently liable to a policy insured for gross negligence and intentional torts. Stapleton maintains that it "stands to reason" from the court's holding in *Bass* that an insurance company can be held to account for its gross negligence or intentional tortious conduct which causes harm to a potential beneficiary under an insurance policy. Nothing in *Bass* can

reasonably be viewed as supporting Stapleton's position. The *Bass* court held only that an adjuster could be liable to a *policy insured* if, in the performance of his contractual duty to investigate and make a realistic evaluation of the claim, the adjuster committed gross negligence or an intentional tort. *Bass*, 581 So. 2d at 1090. The potential liability of an adjuster, according to Bass, derives from that adjuster's *duty* to the *insured*, with whom he has a "purely contractual" relationship. *Id.* Underwriters had no relationship with Stapleton, contractual or otherwise, and as observed *supra*, the law is clear in Mississippi, as in Texas, that an insurance company owes no duty to one who is not an insured or a third-party beneficiary of the insurance policy. Stapleton's reliance on *Bass* is misplaced.

Stapleton argues that even if he does not otherwise have standing, he must nevertheless be permitted to assert his claims against Underwriters in this action, as those claims are compulsory counterclaims which he has asserted in this action of necessity, upon pain of forever losing the right to assert them. This court cannot accept his contention. Rule 13(a) of the Federal Rules of Civil Procedure governs compulsory counterclaims and provides:

> A pleading shall state as a counterclaim any claim which *at the time of serving the pleading* the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject mater of the opposing party's claim or does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . . (emphasis supplied).

A leading commentator has also observed that a

> party need not assert a counterclaim that has not matured at the time he serves his pleading. This is derived from the language in the rule limiting its application to claims the pleader has "at the time of serving the pleading." A counterclaim acquired by defendant after he has answered will not be considered compulsory, even if it arises out of the same transaction as does plaintiff's claim. . . .
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> . . .
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> This exception to the compulsory counterclaim requirement necessarily encompasses a claim that depends upon the outcome of some other lawsuit and thus does not come into existence until the action upon which it is based has terminated.

C. Wright, A Miller and M. Kane, 6 *Federal Practice and Procedure: Civil 2d* § 1411, at 80-82 (1990); *see also Crawford Commercial Constructors v. Marine Indus. Residential Insulation, Inc.*, 437 So. 2d 15, 16 (Miss. 1983) ("there must be a present, existent actionable title or interest which must be completed at the time the cause of action is filed."). Further, it has been held that the rule pertaining to compulsory counterclaims does not grant a party "a substantial substantive right" which did not otherwise exist. *See Desser, Rau & Hoffman v. Goggin*, 240 F.2d 84, 86 (9th Cir. 1957). Underwriters' position on their motions is that neither at the time Stapleton filed his counterclaim, nor for that matter at the present time, did Stapleton have a cognizable claim against Underwriters since, under the well settled law of Mississippi and Texas, injured third parties have no rights against their tortfeasor's insurer

unless and until they shall have obtained a judgment against the tortfeasor/insured. There is merit in this position. The claims sought to be asserted in this action by Stapleton are not "compulsory" counterclaims, since his claims depend upon the outcome of his state court litigation in Master Cause No. 15,196. Since neither Mississippi nor Texas permits suits by an injured third party against his tortfeasor's insurance carrier before he has secured a judgment against the tortfeasor/insured, Stapleton's claims are, at this time, premature.[14] The motion of Underwriters, Texas Snubbing and *Hutchings* to dismiss will, therefore, be granted.

MOTION FOR SUMMARY JUDGMENT

Effect of Settlement on Stapleton's Prospect for Recovery

That Stapleton has no standing to assert affirmative claims for relief against Underwriters, Texas Snubbing or Hutchings does not dispose of the issues relating to the disputed settlement agreement, because Underwriters, in addition to claiming that Stapleton lacks standing to object to the settlement, take the further position that Stapleton, even if he were to obtain a judgment against

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[14] While Rule 13(a) does provide for "permissive" counterclaims, the court is of the opinion that it would not be appropriate to permit Stapleton's counterclaims to be pursued in this action for the reason that Stapleton's claims are at this time merely contingent. And, even were the court persuaded that Stapleton ought be permitted to assert his claims in this action, the court would find dismissal of those claims to be nonetheless in order for the reasons that follow.

Texas Snubbing, would be barred from recovering under the policy since the release executed by Texas Snubbing extinguished its rights in the policy.[15] Underwriters reason that since Stapleton's rights are derivative of Texas Snubbing's rights, and since Texas Snubbing has released its claim against the policy, then Stapleton would likewise be barred from recovery under the policy. *See Jordan*, 774 F. Supp. at 427 (third party stands in shoes of insured); *Lane v. Anchor Casualty Co.*, 355 S.W.2d 90, 91 (Tex. Civ.App. – Houston [1st Dist.] 1962, no writ). The court is therefore called upon to determine whether the settlement entered between Underwriters, Texas Snubbing and Jim Hutchings is effective to deprive Stapleton of any potential right to policy benefits.

It has been held numerous times that the rights of the injured party in a liability insurance policy applicable to an accident arise "immediately upon the happening of the accident," and "cannot be destroyed by an attempted subsequent cancellation, release, or compromise by the insured and insurer." *Spann v. Commercial Standard Ins. Co.*, 82 F.2d 593 (8th Cir. 1936); *See also Wright v. Newman*,

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[15] Stapleton suggests that the court would deprive him of "due process of law" and "equal protection under the law" by holding that he lacks standing to assert a claim with reference to the settlement agreement since such a holding would preclude him from asserting a challenge to the declaratory judgment sought by Underwriters. Stapleton is mistaken in this regard. That he does not have standing to assert a claim for affirmative relief in connection with the settlement agreement by no means prevents him from challenging his opponents' claim that the settlement bars him from recovery under the insurance policy at issue. That is, he is certainly free to deny that the settlement agreement is binding against him.

598 F. Supp. 1178 (W.D. Mo. 1984), *aff'd*, 767 F.2d 460 (9th Cir. 1985) (almost universally accepted that rights of injured third party in respect of a policy of liability insurance irrevocably attach at time of accident and those rights may not be destroyed either by subsequent cancellation of policy or by mutual rescission thereof by insurer and insured); *Capuano v. Kemper Ins. Cos.* 433 A.2d 949 (R.I. 1981) (" '[I]t is the general rule that an injured person's rights cannot be defeated by a cancellation or settlement after an accident has occurred. And since a policy cannot be cancelled after an accident, neither can a prior unauthorized or defective cancellation be ratified after an accident, so as to cut off the rights of the injured person.' ") (quoting 8B Appleman, *Insurance Law and Practice* § 5020 at 515-18); *State Farm Mut. Auto. Ins. Co. v. Kendall*, 104 Ga. App. 481, 122 S.E.2d 139 (1961) (" 'injured party's rights against a liability insurer arise immediately upon the happening of the accident and cannot be destroyed by attempted subsequent cancellation, release or compromise by insured and insurer.' ") (quoting Blashfield, *Cyclopedia of Automobile Law and Practice*, Vol. 6, at 4071, p. 111); *National Surety Corp. v. Sanders*, 53 Ala. App. 405, 301 So. 2d 93 (1974) (" 'After a cause of action has accrued to the injured persons against the insured, then the parties to the contract of insurance cannot by any release, agreement or collusion destroy the rights of the injured persons in the indemnity.' ") (quoting *Goldstein v. Bernstein*, 315 Mass. 329, 52 N.E.2d 559, 561 (1943)); J. Appleman, *Insurance Law and Practice* § 5020, at 515-16 (1981) (citing general rule that "an injured person's rights cannot be defeated by a cancellation or settlement after an accident has occurred."). Based on this principle,

courts have often permitted an injured third party a right of action against his tortfeasor's liability policy despite a release executed by the tortfeasor/insured in favor of his carrier.

This court has found no Mississippi case which has confronted the question of the effect to be given a post-occurrence settlement by the contracting parties as against injured third parties. The Texas courts, however, have had occasion to address the issue. In *Key Life Insurance Company v. Taylor,* 456 S.W.2d 708 (Tex.Civ.App. – Beaumont 1970, writ ref'd, n.r.e.), the court concluded that since a "blanket accident policy" procured by the injured claimant's employer did not indicate that the policyowner was required to be found liable before benefits would be payable, and since the policy by its terms resembled a group policy which was obviously intended to be for the benefit of third parties, namely, the policyowner's employees, then the injured employee could properly bring an action for recovery under the policy without first having obtained a judgment against the employer. The court rejected a contention by the insurer, similar to that advanced by Underwriters, that the employee/claimant was precluded from recovery on the policy since the policyowner/employer had executed a release in favor of the carrier and in so concluding, explained as follows:

> In holding this contract was for the benefit of plaintiff and that he could properly bring this suit, it necessarily follows that only plaintiff could release his cause of action. . . . [O]nce the cause of action accrued in favor of a third party

> beneficiary the Policyowner could [not] do anything to release it. Those cases cited to us by plaintiff are more nearly in point in construing a group policy of insurance providing for penalty and attorney's fees, to mean the injured person was the "holder of the policy" and the one who could recover those benefits.

Key Life, 456 S.W.2d at 709. *Key Life* indicates that a settlement and release between an insured and his liability insurer is ineffective as against a third party who establishes that he is an intended third-party beneficiary of the insurance contract prior to his obtaining a judgment against the insured. In that circumstance, the third party may bring an action against the insurer on the policy despite the insured's release of the carrier. The case at bar, however, presents quite a different situation, for here, as this court has concluded, the insurance contract was not for the benefit of Stapleton but rather was for the benefit of Texas Snubbing, so that unless or until Stapleton were to obtain a judgment against Texas Snubbing, Stapleton would have no interest in the policy. This fact also distinguishes other Texas cases touching upon the question of whether settlements between the contracting parties are to be given binding effect as against the claims of injured third parties.

In *Indemnity Company of America v. Pitts*, 58 S.W.2d 53 (Tex.Comm.App. 1933), an automobile liability insurance policy issued by Indemnity Company to one Kakisaki provided that "[i]n the event a judgment against the assured, arising out of an accident covered in this policy, is returned unsatisfied, because of assured's insolvency or bankruptcy, an action may then be maintained against

the Company by the party in whose favor judgment was rendered." There, an insurer and its assured agreed to a cancellation of the assured's policy *after a third party had obtained a judgment against the assured for negligence in causing her injuries,* and execution on the judgment had been returned unsatisfied. In an action by the injured third party against the insurer for recovery on the policy, she alleged that the carrier and insured had conspired and colluded to make a pretended cancellation of the policy, pursuant to which the insured had made a pretended release of his claim against his insurer, in fraud of plaintiff's rights and for the purpose of defeating her right to proceed against the insurer. The Texas appeals court accepted the plaintiff's contention that the consensual cancellation of the policy between insurer and assured was not valid and binding as to her, reasoning as follows:

> [A]t the time the agreement for cancellation of the policy was made between Kakisaki and the Indemnity Company, the accident in question had already occurred, and the liability which the Indemnity Company was bound to assume, subject to the terms and conditions of the policy, had already become attached. That Florence Pitts, without her consent, could not be deprived of her rights against the company, by agreement between Kakisaki and the company after her rights had accrued, is perfectly plain. Her rights against the company, subject to the terms and conditions of the policy, accrued the moment the liability of Kakisaki for the personal injuries suffered by her arose. The subsisting obligation of the company, upon which her rights against the company depended, was of

> course, originally due to Kakisaki; but even so, that obligation could not, in the absence of a policy provision to that effect, be rescinded, and her dependent rights destroyed, by the agreement to which she was not a party.

Id. at 54. *See also Womack v. Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233 (1956) (citing *Pitts* and holding that post-accident cancellation of policy of automobile liability ineffective against rights of third parties who sued insurer to recover judgment against insured).

In *Pitts*, as contrasted with the present case, at the time suit was filed against the insurer, the injured party had already secured a judgment against the insured and execution on the judgment had been returned unsatisfied. Thus, she had, in fact, satisfied the conditions precedent to her seeking recovery on the insurance contract. Further, the insurance contract itself granted the injured third party the right to proceed against the insurer for recovery of policy benefits in the event she recovered a judgment and was unable to satisfy the judgment due to the insured's insolvency.

In other cases where that right has been afforded to an injured third party, either in the contract itself or a statute of similar import, the courts have consistently viewed that injured third party as having been granted a right in the insurance policy which the contracting parties could not destroy once an accident had occurred. For example, in *Spann v. Commercial Standard Insurance Co.*, 82 F.2d 593 (8th Cir.1936), the court observed that

> [w]here an injured person has a right to sue an insurer conditioned upon an unsatisfied judgment against the insured, the obtaining of the

> judgment and the unsuccessful efforts to collect it are conditions precedent to his cause of action against the insurer for the purpose of setting in motion the statute of limitations. The rights of the injured party arise, however, immediately upon the happening of the accident. This right, arising from contract, cannot be destroyed by an attempted subsequent cancellation, release, or compromise by the insured and insurer. A contrary rule allowing the insured and insurer to destroy the claim of the injured would render the right of little value.

Spann, 82 F.2d at 599. The policy in the case at bar contains no provision granting Stapleton a right to proceed against the policy in the event of securing a judgment against Texas Snubbing, nor does a statute provide him such a right. The cited cases, therefore, cannot be considered controlling on the issue presented. Rather, in the court's view, they stand for the limited proposition that a release by an insured or a consensual cancellation of an insurance policy after an injured third party becomes an intended beneficiary or judgment creditor cannot operate to deprive that third party of his vested right to pursue a claim for recovery under the policy.

In *Finkelberg v. Continental Casualty Co.*, 126 Wash. 543, 219 P. 12 (Wash. 1923), the case most factually analogous to the one at bar, the Washington Supreme Court found that a settlement between an insurer and insured after an accident, but before suit was brought against the insured to establish his liability for injuries to a third party, did not bar the claimant's later suit against the insurer on the policy. There, as here, the carrier's liability on the policy was dependent upon its insured's liability

having been fixed by final judgment, and, as here, the settlement was effected prior to the injured party's having obtained a judgment against the insured. But significantly, in *Finkelberg*, as contrasted with the present case, the court viewed the injured party under the law of Washington as a third-party beneficiary of the insurance contract from the time the policy was first issued. The court explained,

> A third person, beneficially interested in a contract, may maintain an action to recover thereon, even though the identity of the third person may not be known at the time of the execution of the contract.
>
> > "The name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. The fact that the particular person who is to benefit from the promise is not known when the promise is made is immaterial. He may be one of a class of persons if the class is sufficiently described or designated. And the fact that the person to whose benefit a promise may inure is uncertain at the time it is made, and that it is dependent on a contingency, will not deprive the person who afterward established his claim to be the beneficiary of the promise of the right to recover upon it.

Id. 219 P. at 14 (quoting 13 C.J. 711) (additional citations omitted). The identity of the third person became known only upon the happening of the accident by which that person became injured, and her right to maintain an

action against the carrier thus accrued at the time of the accident. By that occurrence, she became a third-party beneficiary, and the insured thereafter "could [not] destroy the rights of appellant by his agreement with [the insurer]." *Id.*

The same result was reached in *Bachman v. Independence Indemnity Co.*, 112 Cal. App. 465, 297 P. 110 (App. 1931), where an injured third party secured a judgment against an insured and filed suit to recover on the insured's automobile liability policy. The insurer raised the insured's non-cooperation as a defense to payment. The court held that "after the happening of an accident coming within the coverage provisions of a policy of insurance, . . . neither the insurer nor the insured can, by any voluntary act, defeat the statutory right given to the injured person to bring an action on the policy after judgment recovered against the insured without some act or omission on the part of the injured which will relieve the insurer from liability." *Id.*, 297 P. at 118. The court explained,

> In the jurisdictions which do not recognize the right of an injured person to bring an action on the insurance policy to collect the amount of a judgment rendered against the insured for damages suffered at his hands, the policy is regarded and treated as a private contract of indemnity between the insurer and insured in which no other person may become interested. In the jurisdictions recognizing such a right of action the policy is regarded as a contract between the insurer and the insured for their benefit and for the benefit of an unknown third person who becomes known and identified upon being injured by the insured.

Id., 297 P. at 117. The court concluded that California would be governed by the latter rule, based on a portion of California's Financial Responsibility Act which provided that "in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person." *Id.* The court commented:

> It would seem a strange and useless proceeding on the part of the Legislature to give to the insured the right to sue the insurer if a recovery in such an action could be defeated by the insured without the knowledge or consent of or any act on the part of the injured person.
>
> It was a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy. * * *
>
> It is contended by appellant that its liability could not accrue under the provisions of the policy until an execution issued upon the judgment obtained against the assured, or judgment debtor, was returned unsatisfied by reason of the insolvency or bankruptcy of said assured. The statute of this state, which is the final word of this issue, does not make the return of execution unsatisfied a prerequisite to the commencement of an action upon the policy.

Id., 297 P. at 117 (quoting *Malmgren v. Southwestern Automobile Ins. Co.*, 201 Cal. 29, 255 P. 512, 513 (1927)).[16]

The policy at issue in *Graham v. United States Fidelity and Guaranty Co.*, 308 Pa. 534, 162 A. 902 (1932), contained both a no action clause, proscribing suits against the insurer until the amount of damages was determined by final judgment or agreement, and an insolvency clause, providing an injured party a right of action against the insurer for the amount of her judgment in the event of the insolvency or bankruptcy of the insured. The plaintiff was injured while a passenger in the insured's vehicle and, in accordance with the policy provisions, sued the insured for damages and obtained a judgment against him. When she was unable to satisfy the judgment due to the insured's insolvency, she filed suit against the insurer to recover benefits under the policy. The insured also filed suit against the insurer for the amount of the judgment obtained against him, but that action resulted in what appears to have been an agreed dismissal, which barred subsequent actions by the insured against the insurer. The insured argued, *inter alia*, that because the suit against it by the insured resulted in an agreement by the insured not to bring suit, which agreement operated to extinguish his cause of action against the carrier on the

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[16] A contrary result was reached in *Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co.*, 203 App. Div. 796, 197 N.Y.S. 606 (1922), because the New York statute, at the time the case was decided, did not explicitly provide the injured party a right of action against the carrier, but rather provided that a cause of action did not accrue to the injured person until an execution issued upon the judgment against the assured had been returned unsatisfied by reason of insolvency or bankruptcy.

judgment against him, the right of the plaintiff to sue the company on the same judgment, being derivative of the insured's rights, was likewise terminated. After determining that the injured plaintiff was a third-party beneficiary of the insurance agreement and that indeed, the policy under consideration "expressly gave the injured party, the beneficiary, the right to sue the company," *id.*, 162 A. at 904, the court rejected the insurer's position, stating:

> Plaintiff was given a direct right of action against the defendant, which accrued when the execution issued on her judgment against Alquist was returned unsatisfied. She exercised it before Alquist sued [his insurer], and months before his suit was settled without notice to her. Her cause of action is unaffected by the disposition made . . . of Alquist's suit.

Id., 162 A. at 905. Similarly, in *Zimmerman v. Union Automobile Insurance Co.*, 133 Or. 600, 291 P. 495 (1930), the court found it significant, in determining the effect of a post-accident cancellation of an automobile liability insurance policy, that the policy in question, was "one which undertakes to afford protection against liability and makes as its beneficiaries, in the event of the Assured's insolvency, individuals negligently injured by the latter." *Id.*, 291 P. at 497 (citing *Rose & Son v. Zurich Gen. Acc. & Liability Co.*, 296 P. 206, 145 A. 813, 815 (1929), for the proposition that " 'While the claimant is uncertain until an accident happens, that event fixes legal responsibility, as to person, time, and place.' "). The essence of the insurance contract, according to the *Zimmerman* court, was that "if [the insured] became indebted to any one through the negligent operation of his car and, because of

insolvency, could not discharge the debt, the company would do so." *Id.*, 291 P. at 498. Ultimately, the court concluded that where "the policy gave a direct primary right against the insurance company to any one injured by the insolvent assured, . . . that . . . right could not be terminated without the acquiescence of the beneficiary of the promise." *Id.*

The plaintiffs in *Hooker v. American Indemnity Co.*, 12 Cal. App. 2d 116, 54 P.2d 1128 (1936), secured a judgment against an insured in a wrongful death action prior to making a claim against the insurer for recovery under the tortfeasor's public liability insurance policy. The insurer contended in that action that there was no coverage for plaintiffs' damages since prior to the accident it had cancelled the policy under which plaintiffs sought recovery and had issued in its place a policy which did not provide coverage for the accident. According to the carrier, the insured ratified the cancellation after the accident by paying premiums on the new policy. The court, however, rejected the insurer's position, holding that the original policy, which was issued pursuant to California's Financial Responsibility Act, specifically prevented any cancellation of the policy by ratification of a cancellation by the insured. The policy provided, in particular, "This policy shall not be canceled or annulled as respects any loss of damage by any agreement between the company and the assured after the assured has become responsible for such loss or damage, and any such cancellation or annulment shall be void."[17] Thus, the court held, "The rights of the heirs at law . . . of the deceased . . . had

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[17] In addition, a provision of California's Civil Code provided: "No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent."

intervened before there was any ratification of the alleged cancellation by the insured. The loss of liability insured against in the insurance policy was for the benefit of these plaintiffs, and when their cause of action accrued, no subsequent act of the insured could deprive them of it." *Id.*, 54 P.2d at 1132.

In *National Surety Corp. v. Sanders*, 53 Ala. App. 405, 301 So. 2d 93 (1974), the insurer paid out policy benefits to the insured, and was thereafter confronted with the claim of an injured party who had secured a judgment against the insured. The court rejected the insurer's contention that its obligations under the policy had been fulfilled by payment to the insured, based upon the mandate of a state statute which provided that upon an injured party's recovery of a final judgment against a defendant who was insured against the loss or damage at the time the right of action arose, the judgment creditor was entitled to have the insurance money provided for in the contract of insurance between the insurer and insured applied to the satisfaction of his judgment. That code section, the court stated, gave the injured party "a vested interest (secondary) by way of hypothecation in the amount due the insured by the insurer of the rendition of the judgment against the insured," *Sanders*, 301 So. 2d at 95, and by virtue of that statute, "the insurance policy in force, while for the protection of the insured, [was] also for the benefit and protection of the injured party." *Id.* Thus, the court concluded that after the cause of action had accrued to injured persons against the insured, the parties to the contract of insurance could not by any release, agreement or collusion destroy the rights of the injured persons in the indemnity. *Id.* (quoting *Goldstein v.*

Bernstein, 315 Mass. 329, 52 N.E.2d 559, 561 (1943)). "To hold otherwise would be to deny the injured party the protection and benefit of" the state statute, "and would, in effect, render the section virtually useless. . . . The public would not be adequately protected if the assured and insurer could stipulate so as to defeat the rights of the injured party." *Id.*, 301 So.2d at 96.

Several factors distinguish this case from each of the cases found by the court which have refused to give effect, as against an injured third party, to a post-accident settlement between an insured and his insurer or a consensual post-accident cancellation or rescission between the insured and insurer. A number of those decisions were rendered by courts of states that permit direct actions against liability insurance carriers.[18] Moreover, the majority of the cases were decided against a backdrop of statutorily mandated liability insurance coverage which was held to inure directly to the benefit of members of the public, and were decided on the theory that permitting the insurer and insured to deny the injured party the benefit of the insurance would defeat the purpose of the statute in question.[19] Further, in each of the

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[18] *See, e.g., Rauch v. American Family Ins. Co.*, 115 Wis. 2d 257, 340 N.W.2d 478 (1983) (Wisconsin direct action statute permits third parties to proceed directly against insurer irrespective of whether liability is presently established or contingent and to become fixed or certain by final judgment against insured, and permits recovery against insurer even though he has given an absolute release to named insured).

[19] *See, e.g., Richard v. Fliflet*, 370 N.W.2d 528 (N.D. 1985) (policy was issued pursuant to state's financial responsibility laws, the overriding purpose of which was to protect innocent

cases affording the injured party a right to proceed against the policy, the injured third party was a third-

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victims of motor vehicle accidents from financial disaster, and thus by statute could not be cancelled or annulled by any agreement between insurer and insured after occurrence of injury or damage); *Rauch v. American Family Ins. Co.*, 115 Wis. 2d 257, 340 N.W.2d 478 (1983) (state's financial responsibility law granted third parties rights in liability insurance contracts which were not dependent on the validity of the contract between the insurer and named insured); *National Surety Corp. v. Sanders*, 53 Ala. App. 405, 301 So. 2d 93 (1974) ("public would not be adequately protected if assured and insurer could stipulate so as to defeat the rights of the injured party," where statute obligated insurer to injured third person to the extent of a judgment recovered by a third person against the assured for a loss covered by the policy); *Allstate Ins. Co. v. Sullam*, 76 Misc. 2d 87, 349 N.Y.S.2d 550 (1973) (state's financial responsibility laws made liability insurance not the concern solely of insured and insurer, but rather inured directly to benefit of third persons injured by insured, such that insurer was estopped to rescind retroactively where rights of injured third party would suffer); *State Farm Mutual Auto. Ins. Co. v. Wall*, 92 N.J. Super. 92, 222 A.2d 282 (1966) (benefit bestowed on innocent third parties emanating from state's financial responsibility law rendered policy noncancellable, notwithstanding fraudulent misrepresentations by insured); *Atlantic Casualty Ins. Co. v. Bingham*, 15 N.J. Super. 328, 83 A.2d 363 (1951) (beneficiaries of state's financial responsibility law and insurance policy provisions required thereby were members of public who may be injured in motor accidents; consequently, policy issued in conformity with Financial Responsibility Act could not be cancelled as against third person injured in accident despite assured's breach of warranty of conditions since "insurer's liability to the assured [was] distinct from its liability to an injured third person."); *Goldstein v. Bernstein*, 315 Mass. 329, 52 N.E.2d 559 (1943) ("Upon the happening of the accident, which was a risk covered by the policy, the plaintiffs acquired a beneficial interest in the proceeds of the policy and the right, if judgments were entered in their favor in

party beneficiary as of the time that party sought to recover under the insurance policy.[20] And in many of the cases granting the injured third party a right of recovery, the insurer's denial of coverage was predicated on the insured's violation of policy conditions, such as cooperation and notice provisions, or upon the insured's fraud or misrepresentation.[21]

From these authorities, it is apparent that the question whether an insured and insurer may enter into a compromise settlement without the consent of an injured third party after the accident has occurred depends upon the status accorded under applicable state law to that

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the tort actions, to enforce in their own names the satisfaction of their judgments out of the indemnity furnished to the insured by the company.").

[20] *See, e.g., Sanders,* 53 Ala. App. 405, 301 So. 2d 93 (1974) (after judgment was obtained by injured third party against insured, that party then filed suit against insurer); *State Farm Mut. Auto. Ins. Co. v. Kendall,* 104 Ga. App. 481, 122 S.E.2d 139 (1961) (settlement was effected between insured and insurer after plaintiff's action against insured was filed and ready for trial); *Olds v. General Accident Fire & Life Assurance Corp.,* 67 Cal. App. 2d 812, 155 P.2d 676 (1945) (state statute granted injured third party right to sue insurer upon obtaining final judgment against assured; court held that "if at the date the final judgment is secured the policy is in effect and the loss covered, the assured and the company cannot by policy provision in any way limit or place conditions upon the unconditional right of the injured third person to bring his action against the insurance company granted to him by the . . . statute. Once the right of the injured third person attaches, the assured and the company cannot by policy provision adversely limit or place conditions on the exercise of that right.").

[21] *See, e.g., Wall,* 92 N.J. Super 92, 222 A.2d 282 (insured's misrepresentations concerning his driving record).

injured third person. If the third party is considered a third-party beneficiary by virtue of the nature and/or terms of the contract itself, by virtue of a statute granting him that status, or by public policy flowing from the nature of the insurance contract, then it is fair to say that in those circumstances, the insured and insurer cannot defeat his right to recover under the policy by post-accident cancellation, rescission or settlement. In other cases, such as where the injured third party is not an intended beneficiary or becomes a policy beneficiary only upon securing a judgment against the insured, then a settlement between the insured and his insurer prior to such time as the third party acquires the status of a policy beneficiary or judgment creditor would not affect the third party's "rights" in the policy as he has no "rights."

Stapleton, as has already been established, has not acquired the status of a third-party beneficiary of the policy, and may never acquire that status. He is, at this point in time, and was at the time the settlement was effected, only a potential third-party beneficiary. Further, unlike the policies at issue in most of the cited cases, the coverage purchased by Texas Snubbing was not mandated by law. A number of additional factors, however, persuade the court that the settlement between Texas Snubbing and Underwriters, given the circumstances under which it was entered, should be given effect. One such factor presented by this case which was present in none of the cited cases is that at the time the disputed settlement was effected, there was not just one claimant asserting a right of recovery against Texas Snubbing. Rather there were multiple claimants, not all of whose claims could have been satisfied from the insurance benefits provided by Underwriters'

policy. Indeed, the claims asserted against Texas Snubbing far exceeded the benefits the policy would have provided, even if it were determined that there was coverage under the policy for the loss.[22]

That brings the court to another very significant distinction between this and many of the cited cases. Specifically, the insurer here does not claim that the policy is void as a result of any act or omission of the insured. Rather, the insurer admits that the policy was in force and effect on the day of the occurrence upon which the various claims are based but claims that the policy, by its terms, expressly excludes coverage for the damages sought by all of those claiming entitlement to policy benefits. Thus, when the settlement was entered, Texas Snubbing, for whose benefit the policy was purchased, was faced not only with the prospect of judgments against it far in excess of the coverage limits provided under Underwriters' umbrella policy, but also with the possibility that it might ultimately be determined that the policy in fact provided *no coverage* for *any* of the claims against it.

Though the court is aware of Stapleton's claim that to permit the parties to defeat his "rights" to the insurance

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[22] The payment of $800,000 to the other landowner claimants exhausted the primary coverage and $300,000 of the coverage under the umbrella policy, leaving $1,700,000 in available coverage without deduction for the likely substantial amounts paid for legal representation of Texas Snubbing, amounts which it appears were payable from policy proceeds. Knostman's claim alone was for in excess of $10,000,000 and there was at least one other claim asserted against Texas Snubbing, in addition to that of Stapleton, for which recovery was sought under the policy. The settlement agreement purported to release Underwriters as to that claim, as well as Stapleton's.

policy proceeds would offend public policy, the court is persuaded that given the circumstances described, public policy does not dictate a contrary result to that reached by the court. At the time of the settlement, Stapleton had no "rights" or beneficial interest in the policy and Texas Snubbing had substantial exposure to liability claims and limited insurance coverage or perhaps, no insurance coverage. Under these circumstances, the court cannot conclude that Texas Snubbing was required to risk that exposure for one who, at the time it entered the settlement, had no interest in the policy. The court concludes, therefore, that the case is governed by the general rule which precludes an injured third party from claiming under the tortfeasor's liability policy to the same extent as the insured.[23] The court thus concludes that the settlement agreement is effective as against Stapleton.

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[23] In *Haines v. Harrison*, 357 Mo. 956, 211 S.W.2d 489 (1948), the death of the insured prevented the injured party from securing judgment against him, as he was required to do as a condition precedent to his recovery under the insured's liability policy. The court held that the injured third party was thus precluded from maintaining an action against the insurer, citing the "general rule . . . that if the insured cannot enforce payment then the third person cannot, since the contract is between insurer and insured." The court stated: "[S]ince death abated the liability as to the tort-feasor it also terminated any liability in the insurance contract," and further observed that,

> Appellant is in no worse position than he would have been had the tort-feasor not carried insurance, or had he lived and breached certain conditions of the policy. . . . The fact that appellant has no greater rights than the insured is a sufficient answer. The law places appellant in the shoes of the insured and when that is done no liability exists and appellant's suit must fail.

Underwriters' motion for summary judgment will therefore be granted.[24]

See also Brown v. Employer's Reinsurance Corp., 206 Conn. 668, 539 A.2d 138, 142 (1988) (where insured could not maintain action against insurer due to his failure to appear at trial of injured party's suit against him, injured third party was likewise precluded from recovery); *Steinbach v. Aetna Casualty & Surety Co.*, 81 A.D.2d 382, 440 N.Y.S.2d 637, 643 (N.Y.App.Div. 1981) (insured's failure to timely notify insurer of occurrence discharged insurer's liability to insured and to injured third party).

As the court observed in *Haines*, this court would observe that by virtue of its conclusion that the settlement should be enforced, Stapleton is in no worse position than he would have been in had Texas Snubbing procured no insurance coverage (which, by law, it was not required to do), or had exhausted the limits of its coverage by the payment of other claims (which in view of the magnitude of the claims against its insured was not unlikely).

[24] Throughout his brief, Stapleton refers to the settlement as "grossly unfair and fraudulent," and "unconscionable and outrageous," and he submits that the settlement "perpetrated a fraud on the Stapleton claimants, and constituted numerous other intentional torts and negligent acts." He states that the parties, by entering into that settlement agreement "committed independent and intentional torts against Stapleton directly, by attempting to deprive and defraud him of his right of recovery as against Texas Snubbing in the state court litigation." Apparently, though, the basis for Stapleton's conclusory statements that the settlement was "fraudulent," "collusive," and "unfair" is simply that the effect of enforcement of the settlement agreement would deprive him of his right to satisfy from policy proceeds any judgment which he might secure against Texas Snubbing.

The court's conclusion in this case might be different if there were proof that the reason for the parties' entering into the settlement agreement was to deprive Stapleton of any potential for recovery. There is nothing to indicate that this was the case and indeed, the proof tends to suggest that there were a variety of legitimate reasons for the parties' effecting this settlement.

CONCLUSION

Based on the foregoing, it is ordered that the motions of Underwriters, Texas Snubbing and Jim Hutchings to dismiss the claims asserted against them by Stapleton are granted. It is further ordered that Underwriters' motion for summary judgment is granted. A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7138

SEAMUS IAIN COWLEY, Individually and as Representative for other underwriters, etc.,
Plaintiff-Counter Defendant-Appellee,
versus
WILLIAM WADELL STAPLETON, Individually and as Representative for the Class Claimants in pending cause No. 15,445, Etc.,
Defendant-Counter Claimant-Cross Claimant-Third Party Plaintiff-Appellant,
versus
TEXAS SNUBBING CONTROL, INC.,
Cross-Defendant-Appellee,
AND
JIM HATCHINGS,
Third Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 01-17-94, 5 Cir., 1994, F.3d)

(March 14, 1994)

Before JONES and DeMOSS, Circuit Judges and COBB*, District Judge.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

*District Judge of the Eastern District of Texas, sitting by designation.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge